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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1981

BILL M. SILKWOOD, Administrator of the Estate of KAREN G. SILKWOOD, Deceased,
Appellant,

VERSUS

THE KERR-McGEE CORPORATION,
a Delaware Corporation, and
THE KERR-McGEE NUCLEAR CORPORATION,
a Delaware Corporation,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

JURISDICTIONAL STATEMENT

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May, 1982

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QUESTIONS PRESENTED

1. Did the court below misapply *Northern States Power Co.* v. *Minnesota** and err in finding a general state punitive damages statute to be federally preempted as repugnant to the Atomic Energy Act.

2. Does nullification of a jury's $10 million punitive damage verdict on preemption grounds represent a denial of due process and of equal protection of the laws, unsanctioned by *Duke Power Co.* v. *Carolina Environmental Study Group.***

PARTIES BELOW

The only parties to this proceeding in the court below are those indicated by the caption of this jurisdictional statement.

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*447 F.2d 1143 (8th Cir. 1971), *aff'd mem.* 405 U.S. 1035 (1972).

**438 U.S. 59 (1978).

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES BELOW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
GROUNDS FOR JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	4
STATEMENT OF THE CASE	4
A. Trial Court Proceedings	4
B. Appellate Proceedings	5
C. Basic Facts	6
D. Federal Licensing and Regulation	7
E. Contamination of Karen Silkwood	8
F. Evidence of Reckless and Wanton Conduct	10
G. Evidence of Actual Malice	11
H. Evidence of Violation of Regulations	11
WHY THIS COURT SHOULD EXERCISE ITS PLENARY POWER	12
A. Introduction	12
B. The Tenth Circuit's ruling erroneously interpreted *Northern States Power Co.* v. *Minnesota* as requiring the court to hold state law punitive damages to be absolutely preempted	15
C. The decision below violated the standards respecting the preemption of common-law rights recognized by this Court	17
D. The Circuit Court erroneously assumed that the Price-Anderson Act precludes punitive damages	22

TABLE OF CONTENTS CONTINUED PAGE(S)

E. The nullification of the jury's punitive damage verdict on preemption grounds represents a denial of due process and of equal protection of the laws 24

CONCLUSION 29

APPENDIX:

Court of Appeals Opinion 1a

Order Denying Petition for Rehearing and Suggestion for Rehearing in Banc 41a

APPENDIX — Part II:

District Court Opinion 42a

Notice of Appeal 127a

Addendum A to Petition for Rehearing and Suggestion for Rehearing in Banc 128a

Addendum B to Petition for Rehearing and Suggestion for Rehearing in Banc 132a

Article VI, Clause 2 of the United States Constitution 137a

Fifth Amendment to the United States Constitution 137a

28 U.S.C. §1254 ..... 137a

28 U.S.C. §1257 ..... 138a

28 U.S.C. §2103 ..... 138a

42 U.S.C. §2011 ..... 138a

42 U.S.C. §2012 ..... 139a

42 U.S.C. §2013 ..... 140a

42 U.S.C. §2014 ..... 141a

42 U.S.C. §2021 ..... 144a

42 U.S.C. §2210 ..... 144a

23 OKLA.STAT. §9 ..... 151a

TABLE OF AUTHORITIES

Cases	PAGE(S)
Alessi v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1982)	2
Askew v. *American Waterway Operators, Inc.*, 411 U.S. 325 (1973)	20
Automobile Workers v. *Russell*, 356 U.S. 634 (1958)	20
Brunswick Corporation v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)	6
City of Burbank v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973)	18
Cox v. *Theus*, 569 P.2d 447 (Ok. 1977)	27
Cox Broadcasting Corp v. *Cohn*, 420 U.S. 469 (1975)	3
DeCanas v. *Bica*, 424 U.S. 351 (1976)	3, 18
Detroit v. *Murray Corp. of America*, 355 U.S. 489 (1958)	3
Duke Power Co. v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978)	14, 25-26
Dutton v. *Evans*, 400 U.S. 74 (1970)	3
Edgar v. *Mite Corp.*, No. 80-1188, 101 S.Ct. 2043 (1981)	3
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Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963)	18
Flournoy v. *Wiener*, 321 U.S. 253 (1944)	3
Gough v. *Rossmoor Corporation*, 533 F.2d 453 (9th Cir. 1976)	6
Goldstein v. *California*, 492 U.S. 546 (1973)	18
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Huron Portland Cement Co. v. *Detroit*, 360 U.S. 440 (1960)	18

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Iacurci v. *Lummus Company*, 387 U.S. 86 (1967) 6
International Bro. of Electrical Wrkrs. v. *Foust*, 442 U.S. 42 (1979) 12, 23, 24
Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977) 17
Kelly v. *Washington*, 302 U.S. 1 (1937) 20
Kewanee Oil Co. v. *Bicron Corporation*, 416 U.S. 470 (1974) 22
Kramarsky v. *Delta Air Lines*, No. 81-1578, 50 U.S. L.W. 3838 (April 20, 1982) 2
Malone v. *White Motor Corp.*, 435 U.S. 497 (1978) 2, 3
Maurer v. *Hamilton*, 309 U.S. 598 (1940) 3
Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. *Ware*, 414 U.S. 117 (1973) 18
N. Y. State Dept. of Social Services v. *Dublino*, 413 U.S. 405 (1973) 18
N. Y. Tel Co. v. *N. Y. St. Dept. of Labor*, 440 U.S. 519 (1979) 19
Nader v. *Allegheny Airlines*, 426 U.S. 290 (1976) 14, 19
Neely v. *Martin K. Eby Construction*, 386 U.S. 317 (1967) 6
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Oller v. *Hicks*, 441 P.2d 356 (Ok. 1967) 27, 28
Phillips Machinery Co. v. *LeBland, Inc.*, 494 F.Supp. 318 (N.D. Ok. 1980) 2
Prudential Insur. Co. v. *Cheek*, 259 U.S. 530 (1922) 3
Pac. Legal Found. v. *State Energy Resources, Etc.*, 659 F.2d 903 (9th Cir. 1981) 16
Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) 17
Reed v. *Fichencord*, 219 P. 937 (Ok. 1923) 27
Reid v. *Colorado*, 187 U.S. 137 (1902) 19, 20
Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) 17
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959) 19

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Sopkin v. *Premier Pontiac, Inc.*, 539 P.2d 1393 (Ok. Ct.App. 1975) 28
State ex rel. Pollution, etc. v. *Kerr-McGee Corporation*, 619 P.2d 858 (Ok. 1980) 27, 28
Terminal R. Assn. v. *Brotherhood of R. Trainmen*, 306 U.S. 79 (1939) 20
Texas & Pac. R. Co. v. *Abilene Cotton Co.*, 204 U.S. 426 (1907) 20
Tully v. *Mobil Oil Corp.*, ... U.S. ....., 102 S.Ct. 1042 (1982) 2
United Construction Workers v. *Laburnum Construction Corp.*, 347 U.S. 656 (1950) 20
United States v. *Generes*, 405 U.S. 93 (1972) 6
Victory Carriers, Inc. v. *Law*, 404 U.S. 202 (1971) 20

United States Constitution

Article VI, Clause 2 2
Fifth Amendment 24-25

Statutes

28 U.S.C. §1254(2) 2, 3
28 U.S.C. §1257 3
28 U.S.C. §1491 25
28 U.S.C. §2103 3
42 U.S.C. §2011 2
42 U.S.C. §2014(d) 22
42 U.S.C. §2021(k) 16
23 OKLA.STAT. §9 2
10 C.F.R. §140.81-85 (1980) 24

Legislative Materials

Hearings on Governmental Indemnity and Reactor Safety, 85th Cong., 1st Sess. (1956) 23
S.Rep. No. 296, 85th Cong., 2nd Sess. (1957) 23
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Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

JURISDICTIONAL STATEMENT

Bill M. Silkwood, Administrator of the Estate of Karen G. Silkwood, Deceased, files this Statement to establish that the Court has jurisdiction to review the opinion and orders entered by the United States Court of Appeals for the Tenth Circuit and should exercise its jurisdiction in this case.

OPINIONS BELOW

The opinion of the Honorable Frank G. Theis overruling Appellee's Alternative Motion for Judgment n.o.v. or New Trial appears at 485 F.Supp. 566 *et seq.* and is included in the Appendix, pp. 42a-126a. The opinion of the

United States Court of Appeals for the Tenth Circuit reversing in part, the District Court appears at 667 F.2d 908, *et seq.* It includes a detailed dissent by Judge Doyle, 667 F.2d, at 923-930, and is included in the Appendix, pp. 1a-40a. The court's order denying Appellant's Petition for Rehearing is included in the Appendix, p. 41a.

GROUNDS FOR JURISDICTION

This appeal arises from an opinion and order of the United States Court of Appeals for the Tenth Circuit, which determined Oklahoma's punitive damage statute,[1] as applied to a federally licensed nuclear facility to be invalid as repugnant to Article VI of the United States Constitution and to the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*

The order denying Appellant's Petition for Rehearing and Suggestion for Rehearing In Banc was entered by the Court of Appeals on February 19, 1982. A timely Notice of Appeal was filed on May 10, 1982.

This appeal is within this Court's appellate jurisdiction pursuant to 28 U.S.C. § 1254(2). A Court of Appeals decision holding a state statute invalid by preemption under the Supremacy Clause, Article VI of the U.S. Constitution, falls within the Court's mandatory appellate jurisdiction under § 1254(2). *Tully* v. *Mobil Oil Corp.*, ___ U.S. ___, 102 S.Ct. 1047, 1049n.1 (1982); *Malone* v. *White Motor Corp.*, 435 U.S. 497, 499 (1978); *Alessi* v. *Raybestos-Manhattan,*

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[1]Under Oklahoma law, punitive damages are statutory, 23 O.S. §9. *Phillips Machinery Co.* v. *LeBland, Inc.*, 494 F.Supp. 318 (N.D. Okl. 1980).

Inc., 451 U.S. 504, 506 (1982); *Edgar* v. *Mite Corp.*, No. 80-1188, *probable jurisdiction noted*, 101 S.Ct. 2043 (1981); *Kramarsky* v. *Delta Air Lines*, No. 81-1578, *probable jurisdiction noted*, 50 U.S.L.W. 3838 (April 20, 1982).

Invalidation of a state staute as applied also comes under § 1254(2) mandatory appellate jurisdiction. See *Malone* v. *White Motors Corp.*, *supra*, *Dutton* v. *Evans*, 400 U.S. 74, 76 n.6 (1970); *Detroit* v. *Murray Corp. of America*, 355 U.S. 489, 491-92 (1958).

The decision also raises serious federal constitutional due process and equal protection questions. These issues are unavoidably presented by the appellate court's negation of the state statute and are subject to this Court's appellate review under § 1254(2).[2]

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[2]Even if the federal constitutional questions presented were viewed as separate from the Court's state law invalidation determination, they still should fall within the Court's §1254(2) appellate jurisdiction. See HART & WECHSLER, *The Federal Courts and the Federal System*, 1373 (2d Ed. 1973); WRIGHT, MILLER & COOPER, *Federal Practice and Procedure, Jurisdiction*, §4037 (1978). *But see*, 12 MOORE, FEDERAL PRACTICE, ¶435.012[2].

Under the analogous 28 U.S.C. §1257, the cases make clear that consideration of additional questions is appropriate. See *Energy Resources Group* v. *Kansas Power & Light Co.*, *probable jurisdiction noted*, 50 U.S.L.W. 3783 (March 30, 1982), see jurisdictional statement at 2, n.2; *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 487 n.14 (1975); *Flournoy* v. *Wiener*, 321 U.S. 253, 263 (1944); *Prudential Insurance Co.* v. *Cheek*, 259 U.S. 530, 567 (1922).

If the Court were to conclude that one of the questions presented would not qualify for appellate review under §1254(2), it should be treated as a petition for certiorari on that question in accordance with 28 U.S.C. §2103.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes involved are set forth in the Appendix accompanying this statement: the Supremacy Clause, Article VI, Clause 2, of the United States Constitution; the Fifth Amendment to the United States Constitution; 28 U.S.C. § 1254(2), 28 U.S.C. § 1257, 28 U.S.C. § 2103; relevant parts of the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*; the Oklahoma punitive damage statute, 23 O.S. § 9.

STATEMENT OF THE CASE

A. Trial Court Proceedings

Appellant filed his diversity action in the United States District Court for the Western District of Oklahoma alleging that his deceased daughter, Karen G. Silkwood, suffered serious physical injury and emotional distress when she was contaminated with plutonium from the nuclear fuel fabrication plant operated by the Appellees at which she we employed. Predicating liability upon negligence and strict liability, Appellant also sought punitive damages. Appellant's claim was for $1,505,000 actual damages and $10,000,000 punitive damages.

After extensive pre-trial pleading and discovery, trial commenced on March 6, 1979. During an eleven-week trial over 40 witnesses testified and 200 exhibits were admitted. Appellees' motion to dismiss was overruled, as was a motion for directed verdict. The jury was instructed and given five special interrogatories to answer. After deliberating twenty-six hours over a three-day period, the jury returned

a verdict in the amount of $505,000 actual and $10,000,000 punitive damages. Appellees' Motion for Judgment n.o.v. and New Trial was overruled. (Appendix, pp. 42a-126a.

B. Appllate Proceedings

At the Tenth Circuit, Appellees challenged the ruling of the trial court rejecting its post-trial motions on numerous grounds. The focus of Appellees' attack was first, that the injuries upon which $500,000 of the actual damages was awarded were subject to the exclusive jurisdiction of the Oklahoma Workers' Compensation Act[3] and, second, that the award of damages, either actual or punitives, was preempted where "substantial compliance" with the Nuclear Regulatory Commission regulations and license conditions was demonstrated. Amicus Atomic Energy Forum, a nuclear trade association, additionally argued that strict liability was inappropriate for this case.

In a 2-1 decision, the Court of Appeals affirmed the imposition of strict liability for appellees' ultrahazardous activities and upheld the jury's award of $5,000 for property damage, but reversed the trial judge's decision on the personal injury[4] and punitive damages. As to punitive damages, the majority held that *Northern States* required

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[3]Of the total award, $5,000.00 was the stipulated value of the personal belongings of Karen Silkwood which were confiscated as a result of the contamination of her apartment.

[4]The trial judge declined to allow the presumption of coverage which benefits a claimant in an Industrial Court proceeding to be invoked by an employer-defendant in a civil case. The Court of Appeals reversed, invoked the presumption to shift the burden to Appellant, and found that he failed to rebut the prima facie case so established.

the Court to "hold invalid any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material." Punitive damages were barred *per se* "whether Kerr-McGee violated AEC regulations in the conduct of its plant operations" or not (Appendix, p. 24a).

The Court remanded the case to the district court "for further considerations consistent herewith"[5], and denied Appellant's Petition for Rehearing.

C. Basic Facts

Appellees operated a plant some 30 miles north of Oklahoma City, Oklahoma, which produced plutonium-based fuel rods for an experimental breeder reactor.[6] Karen Silkwood was employed as a laboratory analyst at this facility from August, 1972, until her death on November 13, 1974.

Appropriately named after the Roman god of the infernal regions, plutonium is a man-made, highly radioactive

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[5]In light of this remand (see *Gough* v. *Rossmoor Corporation*, 533 F.2d 453 (9th Cir. 1976)) and the nature of the issues raised by Appellant in his Petition for Rehearing, the trial judge may later determine Appellant's entitlement to a new trial so that Appellant would have the opportunity to remedy the defect in his case which was first discovered by the Court of Appeals. *See Neely* v. *Martin K. Eby Construction*, 386 U.S. 317 (1967); *Iacurci* v. *Lummus Company*, 387 U.S. 86 (1967); *United States* v. *Generes*, 405 U.S. 93, 112-113 (White, Concurring) (1972), cf. *Brunswick Corporation* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489-490 (1977).

[6]Citations to the record have been omitted. All facts recited in this Statement were fully referenced in Appellant's voluminous brief filed with the Court of Appeals.

element used in thermo-nuclear weapons and experimental fuels. Extremely persistent[7], it is explosive, flammable, and possibly the most toxic substance known to man. Even in submicroscopic quantities[8], it is extremely dangerous especially if inhaled[9] where it emits thousands of radioactive particles[10] per minute inflicting serious and irreversible damage to the cells and tissues.[11]

Appellees acknowledged that because of these hazards, the plutonium they possessed had to be absolutely contained.

D. Federal Licensing and Regulations

Appellees' facility was licensed and periodically inspected[12] by the Atomic Energy Commission (later, the Nuclear Regulatory Commission, NRC). The NRC's re-

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[7]The "half-life" of the isotope Pu239 is 24,000 years.

[8]A speck of plutonium the size of a pollen gran is a sufficient quantity to guarantee lung cancer.

[9]Once inhaled, its "biological half-life" is 200 years. There is no known method to safely remove plutonium from the lungs.

[10]Giants in this subatomic world, alpha particles deliver enormous energy to the cell (2.5 million times the equivalent amount of carbon), and disrupt the genetic information in the cells ("tearing pages out of the books in a library",) making them cancerous. That alpha particles produce cancer has long been recognized.

[11]The amount of plutonium conceeded to be present in Karen Silkwood's lungs at the time of her death emitted 10,000 alpha particles each minute.

[12]Although some inspections were to be unannounced, employees testified that they were always alerted to inspections and cleaned up the plant in anticipation.

gional director testified that since Appellees' facility utilized a unique production process, it presented the AEC licensing division with major uncertainties. As a result, the license was not designed to cover all contingencies.[13] These regulatory standards reflected only the minimum care that should be given; compliance was no guarantee of safety; the licensee was expected to do more than was minimally required if demanded by reasonable prudence.

AEC inspectors cited Appellees for over 75 violations of specific regulatory requirements and expressed harsh criticism of the operation of the facility.[14] However, AEC never imposed a fine or other punishment.

E. Contamination of Karer Silkwood

In separate incidents on November 5th, 6th, and 7th, 1974, Karen Silkwood was contaminated with plutonium from Appellees' facility. On November 7th, she was found to be highly contaminated and traces of plutonium were

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[13]In one instance, two workers who had eaten at a local restaurant were found to be contaminated when they returned to the plant. Neither the AEC nor the restaurant was notified. The license and regulations did not specifically require such a notification. The AEC became aware of this incident 18 months after it happened through a tip from a concerned citizen who had learned of it from workers at the plant.

[14]Regional Director James Keppler testified that there was no evidence that Kerr-McGee management was on top of the situation, that Kerr-McGee was not committed to the "as low as practical" standard, had failed to replace professional health physicists lost years before, that contamination incidents seemed to get short shrift, equipment at the plant was archiac and prone to break down and the large number of procedural errors was attributable to inadequate training, personnel turnover, or lack of supervision.

discovered throughout her apartment[15] with the highest levels found on a package of food in her refrigerator. Distraught upon learning she was seriously contaminated, she expressed her belief that the dose she had suffered was lethal and that nothing could be done to help her; she feared that she would be unable to bear normal children.

On November 10, 1974, Silkwood underwent whole body and chest counting procedures at Los Alamos Scientific Laboratory. On the evening of November 13th, she was killed in an automobile accident while on the way to deliver to a *New York Times* reporter documents establishing falsification of quality control records at Appellees' facility.

Subsequent to her November 7th contamination, it was discovered that insoluble plutonium had been added to urine and fecal samples Silkwood had been submitting in the prior four weeks as part of a routine bioassay program. No at-work source of any of the contaminations was ever established by Appellees' management or health physics personnel or by the AEC investigation team.[16]

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[15]The contaminated apartment had to be systematically dismantled in a month-long operation and all of her personal possessions placed in large drums for disposal.

[16]Appellees contended that Silkwood intentionally removed plutonium from the plant and contaminated herself while trying to spike a urine sample in an effort to embarass the company. However, the jury answered "No" to a special interrogatory on this issue (Appendix, p. 125a), and the Court of Appeals upheld the jury's finnding (Appendix, p. 8a).

F. Evidence of Reckless and Wanton Conduct

Appellant's evidence established that from the day the plutonium plant opened, Appellees demonstrated a total insensitivity to the extremely hazardous nature of plutonium and the activities conducted at that facility. From the poor design of the plant and selection of faulty equipment and processes to the inadequate training and constant emphasis of production over worked safety, this reckless disregard for the welfare of Appellees' employees and the general public was manifest. (Between 1971 and 1975 employees were exposed to harmful radiation in some 574 separate contamination incidents.)

Appellees designed a physical security system so that .5 gram — enough plutonium to give 38 million Americans their lifetime lung burden — could be removed without detection; Appellees' inventory system was so lax that three years after the plant was closed, over forty *pounds* of plutonium could still not be located; when a fire seriously contaminated an area of the plant, workers were required to work on production in double protective suits and full-face respirators for shifts of 10 to 12 hours — a practice described as "irresponsible" and "unexcusable" by expert witnesses.

The Appellees' training program for its new employees deliberately omitted the use of the word "cancer" in materials purportedly disclosing the risks of the job and used arcane jargon incomprehensible to the young workers, many from rural backgrounds who comprised the plant's work force.

This litany of abuse was condemned by Appellant's expert witnesses. Each of these world-renowned experts decried the conduct of the Appellees — Dr. Morgan stating it was the worst facility he had ever reviewed in his 35 years as a consultant to the nuclear industry throughout the world. He noted that there was "a callous and hardened disregard for safety by Kerr-McGee's management."

G. Evidence of Actual Malice

Appellant established actual malice and personal animus directed toward Karen Silkwood as a result of her union and information gathering activities. (See Appendix, pp. 132a-136a).

H. Evidence of Violation of Regulations

At trial, Appellant established that, as to Karen Silkwood, Appellees violated AEC regulations governing radiation exposures for the general public and nuclear workers as well as the As Low As Practical standard. Additionally, Appellees repeatedly violated AEC requirements with regard to inventory and accountability controls, physical security, training, management and reporting. In short there was ample evidence to warrant punitive damages, as the trial court held in rejecting Appellee's challenges to the verdict. The Court of Appeals did not dispute the adequacy of the evidence to support the jury's punitive damage verdict.

WHY THIS COURT SHOULD EXERCISE ITS PLENARY POWER

A. Introduction.

This Court should exercise its plenary power in this case because the Court of Appeals below rendered an opinion which is legally incorrect, unsound, and fundamentally unjust — not only to Appellant herein, but to individuals and states across the country.

The decision below decrees a *per se* rule of absolute immunity from state law-authorized punitive damages for all[17] companies which handle nuclear materials. This absolute protection against punitive damage liability would apply without regard to how reckless or even intentional the wrongful conduct may be and regardless of the degree of resultant harm to members of the public.[18]

If approved by this Court, the decision below would preclude punitive damages in the 46 states which authorize them. Citizens in each of these states would be deprived of the prophylactic protection against future reckless conduct which their state law provides. The deprivation would be

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[17]The concurring justices in *Intl. Bro. of Electrical Wkrs.* v. *Foust*, 442 U.S. 42 (1979), were critical of the declaration of a *per se* bar to punitive damages in the context of the Railway Labor Act. Much of their analysis applies to the *per* se bar to punitive damages by the court below.

[18]The evidence Appellant presented at trial of Appellee's misconduct was found ample to justify a large punitive damage verdict by the trial court in upholding the $10 million punitive damage verdict which the jury found to be appropriate. The Appeals Court below did not challenge the finding that the jury's punitive damage verdict was fully justified by the evidence presented at trial.

not only to individual citizens but to the states as well. States would be deprived of their right and the power to perform their duty, to protect the health and welfare of their citizens. Also diminished is their right to have respected state laws of general application which are unquestionably a valid exercise of state prerogatives.[19] The decision thus disturbs, in a significant way, the delicate balance between federal and state governmental authority in our federal union of states. Thus, if state punitive damages for nuclear facilities are subject to preemption because the state's sanctions could interfere with the federal enforcement mechanism, punitive damages could be preempted any time a company is subject to a federal regutory agency which has the authority to impose fines.

This is the first case involving nuclear power in which punitive damages have been awarded by a jury. It was the first case to reach the courts involving claims for personal injuries and property damages from an escape of dangerous radiation into the public sector and the first to establish strict liability as well.[20]

This case also demands review because the Court below has premised its far-reaching nullification of state laws

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[19]Appellant is informed that concerns of state governments will be expressed directly to this Court in the form of amicus briefs in support of this Jurisdictional Statement.

[20]The court below easily upheld the trial court's ruling that damages may be recovered under a strict liability theory under Oklahoma law. The court flatly rejected the contention of appellees that permitting recovery under strict liability without requiring violations of NRC regulations would conflict with and be preempted by NRC regulations of licensed nuclear facilities.

and individual recovery rights in private lawsuits on this Court's memorandum affirmance of the Eighth Circuit's decision in *Northern States Power Co.* v. *Minnesota*. The Court's extension of *Northern States* to nullify a state tort recovery statute of general application calls for review by this Court. Indeed, the continued vitality of *Northern States* in light of developments since the decision is also an appropriate subject for review.

In concluding that *Northern States required* it to preempt, the court below did not follow *Nader* v. *Allegheny Airlines*, 426 U.S. 290 (1976). The decision below is heavily predicated on the Court's conclusion — which again has far-reaching national implications — that Congress precluded punitive damages in the Price-Anderson Act. As noted below, this determination as to Congress' implicit assumption about punitive damages is contradicted by the legislative history of the Act.

The appellate court's opinion also raises profound federal due process and equal protection questions, particularly in light of the analysis employed by this Court in *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978).

The decision presented here for review raises legal and public policy issues whose national significance cannot be denied. Some have never been addressed by this Court. Others involve apparent conflicts with principles and standards established by this Court in other cases. These considerations make this case one which fully justifies exercise of this Court's plenary power.

B. The Tenth Circuit's Ruling Erroneously Interpreted *Northern States Power Co.* v. *Minnesota* as Requiring the Court to Hold State Law Punitive Damages to be Absolutely Preempted.

Appellant submits that the Circuit erred in applying *Northern States* at all and erred in finding preemption required or even possible on the basis of *Northern States*.

Northern States was a case of quasi-*expressed* preemption and one involving a direct clash of technical regulations established by both federal and state regulatory bodies.

This case, by contrast, involves no state agency and no state regulations. The state action involved is the application of the state's general punitive damage law, along with other state liability principles in a private lawsuit. Neither the federal nor state government is even a party in the case. It also involves no clash between the state activity and the federal regulatory scheme.

Moreover, *Northern States* involved the adoption by a state of a competing regulatory scheme long after the federal system was in place. Here, the Court has encroached upon an area of law traditionally left to the states. Disregarding these fundamental distinctions the Court applied *Northern States* mechanically, instead of the analysis employed in cases involving the preemption of pre-existing common law rights.

The Court also erred in applying *Northern States* without regard to specific manifestations of Congressional intent that state tort law was to control. The section of the Atomic

Energy Act relied upon in *Northern States* was adopted in 1959.[21] After the enactment of that provision, Congress restated its unmistakeable desire that the states were to remain free to enforce their respective tort laws without restriction.[22]

Indeed, Congress has had numerous opportunities to indicate that punitive damages under state law were barred, but has never done so. Specific congressional statements of the unlimited application of state tort law and congressional silence on a desire to preempt punitives belie the inference made by the court below — that punitives would somehow be "intrusive" on the federal regulation of nuclear power.

Additionally the court below took no cognizance of the sweeping changes that have occurred in the "full objectives and purposes" of Congress since *Northern States* was decided. See STENSVAAG, *State Regulations of Nuclear Generating Plants Under the Clean Air Act Amendments of 1977*, 55 So.Cal. L.Rev. 511 (1982); *Pac. Legal Found.* v. *State Energy Resources, Etc.*, 659 F.2d 903, 926-8 (9th Cir. 1981).

These developments since *Northern States* argue against any extension of the decision. Indeed, they call into question its continued vitality,[23] indicate that Congress does not

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[21] 42 U.S.C. §2021(k) (Appendix, p. 144a).

[22] *e.g.* See S.Rep. No. 1605, 89th Cong., 2nd Sess. (1966) (Appendix pp. 128a-130a).

[23] Commentators have noted that in light of the subsequent developments, the *Northern States* decision may no longer be viable. See WOYCHICK, *State Opportunities to Regulate Nuclear Power and Provide Alternative*

intend to favor nuclear power over all other energy sources and recognizes safety in nuclear facilities as a paramount concern.[24]

C. The Decision Below Violated the Standards Respecting Preemption of Common-Law Rights Recognzied by This Court.

The court below erred in extending *Northern States* to require nullification of a general state tort statute under the preemption doctrine.

The state's police powers are not to be superseded "unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Accord, Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978). All expressions of Congressional intent are to the contrary — state tort law is to be applied to nuclear incidents which do not rise to the level of an Extraordinary Nuclear Occurrence (ENO) under the Price-Anderson Act.

Even if unexpressed, a Congressional preemptive intent may be implied. See, e.g., *Ray* v. *Atlantic Richfield, supra, Rice* v. *Santa Fe Elevator Corp., supra; City of Bur-*

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[23] (Continued)
Energy Supplies: Part I, 15 U.S.F.L.Rev. 129, 148 (1980); MEEK, *Nuclear Power and State Radiation Protective Measures: The Impotence of Preemption*, 10 Env.L. 1, 66 (1979).

[24] The opinion below implicitly assumes that any state action, including an award of punitive damages, which might possibly impede the development of nuclear power poses a conflict and is subject to preemption. However, as Judge Doyle observes in his dissenting opinion, a large award of actual damages impedes just as much as an equivalent punitive award. (Appendix, p. 38a)

bank v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973). Still, the Congressional intent to preempt must be unambiguous. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 146-47 (1963).[25]

While preemption may be appropriate if the state law *conflicts* with the federal law, the cases make it clear that conflicts are not to be lightly inferred; the initial presumption is in favor of the validity of the state law.[26]

This Court has stated that the proper judicial approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 127 (1973). The court below made no effort to reconcile Oklahoma's punitive damage statute with the federal regulatory framework applicable to nuclear facilities — an easy task, for they are completely harmonious. Nor did the court demonstrate how the jury's punitive damage verdict in this case would obstruct or interfere with the federal regulatory plan established by Congress.

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[25]No preemptive intent can be inferred simply from the fact that the federal regulatory pattern is comprehensive, *DeCanas* v. *Bica*, 424 U.S. 351, 359-60 (1976); *N. Y. State Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 415 (1973), or from the fact that the federal law touches on an area of predominantly national concern. *DeCanas* v. *Bica*, *supra*, at 354-55.

[26]Courts are not to *seek out* conflicts between the state and federal laws where none clearly exists. *Huron Portland Cement Co.* v. *Detroit*, 360 U.S. 440, 446 (1960); *Goldstein* v. *California*, 492 U.S. 546, 554 (1973). A conflict will be found "where compliance with both federal and state regulations is a physical impossibility," *Florida Lime*, *supra*, at 142-43; or where the state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

A variety of decisions of this Court have clearly enunciated the principle that in cases involving state police powers and laws protecting interests deeply rooted in local feelings and responsibility, great deference must be given to the state law. The presumption should be against federal preemption of the state law.[27]

The punitive damages statute preempted by the court below is unquestionably a law designed to protect the public and one which involves the most fundamental local responsibilities and self-protection interests.

In *New York Telephone, supra*, the Court recognized that laws protecting against *personal torts* or violence to property . . . have defined the "local feeling and responsibility" exception to preemption. 440 U.S. at 570. (Emphasis added.)

Plainly the punitive damages statute at issue here fits this definition.

In *Nader* v. *Allegheny Airlines*, 426 U.S. 290 (1976), this Court defined the standards for finding pre-existing common law rights preempted in these terms:

> "Even absent a savings clause, unless it is found that the preexisting right is so repugnant to the statute that the survival of such right would, in effect, deprive the subsequent statute of efficacy, in other words, render

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[27]See, *e.g.*, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959); *N. Y. Tel. Co.* v. *N. Y. St. Dept. of Labor*, 440 U.S. 519, 540 (1979); *Reid* v. *Colorado*, 187 US. 137, 148 (1902). ("It should never be held that Congress intends to supersede . . . the police powers of the state . . . unless its purpose to effect that result is clearly manifest.")

it nugatory," the right must stand. 426 U.S. 290, 299, citing *Texas & Pac. R. Co.* v. *Abilene Cotton Co.*, 204 U.S. 426 (1907).

Congress' pronouncements that state tort law is to control constitutes just such a savings clause.

Cases arising in the labor law context — where there is a clear Congressional intent to occupy the field, unlike the situation in this case — likewise indicate this Court's extreme reluctance to find state common law remedies preempted.[28]

The general rule of deference to state legislation applying the historically recognized police powers of the state is especially strong where health and safety issues are involved.[29] The exercise of state police power is to be superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together. *Kelly* v. *Washington*, 302 U.S. 1, 10 (1937); *Askew* v. *American Waterway Operators, Inc.*, 411 U.S. 325, 341 (1973).

Appellant has been unable to find a single instance in which a state common law tort remedy of general applica-

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[28]*See, e.g., Farmer* v. *United Broth. of C & J of America, Local 25*, 430 U.S. 290 (1977); *Automobile Workers* v. *Russell*, 356 U.S. 634, 646 (1958); *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656 (1950).

[29]See *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 211-213 (1971); *Terminal R. Assn.* v. *Brotherhood of R. Trainmen*, 318 U.S. 1, 6-7 (1943); *Reid* v. *Colorado, supra. See, also*, Comment, *A Framework for Preemption Analysis*, 88 Yale L.J. 363 (1978). ("Laws that protect persons inside the state borders from physical injury have received the greatest deference from the Court.")

tion has been held preempted by federal legislation under the Supremacy Clause. Where punitive damages have been disallowed the basis has been that the federal statute did not provide authorization for them.

The question of whether a civil action or some aspect of it is subject to preemption under Article VI of the Constitution has been presented in very few cases. Those courts which have addressed the issue have usually rejected preemption as the dispositive formula. See cases cited by Judge Doyle at Appendix, pp. 34a-35a, n.2.

The decision below did not determine, nor could it, that application of Oklahoma's punitive damage statute to a licensed nuclear facility would "render federal regulation of nuclear facilities nugatory," "produce an irreconcilable conflict," or "stand as an obstacle to the accomplishment of the full purposes and objectives of Congress." In reality, Oklahoma's law and the federal scheme do not conflict at all.

It cannot be disputed that Congress contemplated that state tort law is to be applied[30] to a case below the ENO threshold, and that the state may impose a standard of care on nuclear operations without limitation.[31]

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[30]The court below *upheld* the imposition of state-based strict liability and rejected appellee's position that preemption decreed that liability could not be imposed unless a violation of the federally-mandatted standard of care be shown.

[31]In the Three Mile Island incident proceedings the NRC itself acknowledged that state law controls and, although this verdict had been rendered and a number of TMI-related suits seeking punitive damages had been filed, the NRC has never indicated in its numerous orders, publications and pronouncements that punitive damages are preempted. 45 Fed. Reg. 2590-5 (April 23, 1980).

Certainly the imposition of punitive damages for reckless, willful and wanton conduct in violation of a state standard of care does not constitute an obstacle to the *full* purpose[32] and objectives of Congress: to protect the common defense and security and the health and safety of the public. 42 U.S.C. § 2014(d). Rather, as an integral part of state law, it properly supplements the federal standard of care by deterring recklessness.

General punitive damage statutes unquestionably represent a valid exercise of the historically respected authority of states' police powers and their right and duty to safeguard the health and welfare of their citizens. To nullify such an exercise of state authority, especially without any Congressional expression requiring such a result, represents a serious interference with the state's prerogatives and the rights of state citizens to the protection of their state's protective laws.

D. The Circuit Court Erroneously Assumed That the Price-Anderson Act Precludes Punitive Damages.

The lynchpin of the opinion below is the assertion that no punitive damages may be awarded under the Price-Anderson Act in the event of an Extraordinary Nuclear Occurrence (ENO). While acknowledging that neither Price-Anderson nor its legislative history dictates this result, the Court seizes upon an isolated quote from *Duke*

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[32]For an example of a proper consideration of the *full* Congressional purpose in an area of federal occupation — patent law — see *Kewanee Oil Co.* v. *Bicron Corporation*, 416 U.S. 470 (1974).

Power to construct a negative pregnant.[33] From this erroneous assumption, the Court apparently reasons that to allow a plaintiff to recover punitive damages under a state statute (when a plaintiff in federal court under Price-Anderson cannot) would "substantially compete" with the federal scheme.

Contrary to the Court's assertion, the availability of punitives under Price-Anderson *was* considered by Congress: an early proposal by the AEC would have excluded "willful damages" from the indemnity agreement for licensees and contractors. Thus, the term "public liability" as used throughout the Act would have excluded punitive damages as well as workers' compensation and war damages. This suggestion was specifically rejected by the Joint Committee on Atomic Energy for licensees, S.Rep. No. 296, 85th Cong., 2nd Sess., 17-18 (1957) and contractors, *Hearings on Governmental Indemnity and Reactor Safety*, 85th Cong., 1st Sess. 176 n.318 (1956). Moreover, none of the insurance policies submitted by the industry or the indemnification contracts executed by the government with its contractors excluded punitive damages from coverage. *Hearings on Governmental Indemnity and Reactor Safety*, pp. 101-103 (1957), GREEN, ROWDEN & KRAMER, *The Three*

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[33]Price-Anderson "implicitly assumed that only compensation damages will be awarded" (Appendix, p. 22a). The court reasons that since Price-Anderson does not specifically authorize punitives, and *does* provide for compensation, then the remedy is limited to compensation *only*. The obvious rejoinder to this is provided by the concurring opinion in *International Bro. of Electrical Wkrs.* v. *Foust*, 442 U.S. 42, 54-55 (1979): the court has converted the floor beneath the plaintiff's remedies into a ceiling on top of them.

Mile Island Episode: Liability and Financial Implications, 1979, 2 Energy Law Serv. (CALLAGHAN) § C.46 n.15 at p. 55.

As adopted in Price-Anderson, the term public liability entails "any legal liability arising out of or resulting from a nuclear incident," with the exception of workers' compensation and was damages.[34] Certainly, the adoption of this definition coupled with the legislative history and position taken by the insurance industry belies a negative pregnant construction.[35]

While a policy argument might be made for limiting the recovery of punitives in a full-blown nuclear catastrophe,[36] the availability of punitives for an ENO demonstrates, *a fortiori*, that punitive damages have not been precluded for a sub-ENO incident.

E. The Nullification of the Jury's Punitive Damage Verdict on Preemption Grounds Represents a Denial of Due Process and of Equal Protection of the Laws.

The decision below also demands appellate review by this Court because it involves due process and equal pro-

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[34]So limited, public liability is used throughout Price-Anderson, *e.g.*, 42 U.S.C. §§ 2210(a), 2210(c), 2210(m), 2210(n)(2), 2210(o).

[35]Again paraphrasing the *Foust* concurring opinion — if there is any negative pregnant to be drawn, it is that a nuclear operator chargeable with compensatory damages, may be taxed with punitives, too. 442 U.S. at 55.

[36]*e.g.* If the $560 million ceiling was exceeded by the addition of punitive damages, individual claimants might be denied full recovery. However, the NRC's definition of an ENO would allow an incident which fell far short of the ceiling to qualify and no such threat of inadequate compensation would ever be presented. See 10 C.F.R. §140.81-.85 (1980).

tection problems far more serious, direct and pervasive than those considered in *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978).

In *Duke Power*, the Court upheld the Price-Anderson Act and its $560 million limitation of liability against due process and equal protection challenges. In upholding the limit on collective recovery, the Court emphasized that the risk of a nuclear incident which would involve sufficient damages to exceed the liability limit was exceedingly small. 438 U.S. at 85-86. The Court also took cognizance of Congress' pledge to "review the problem and take appropriate action should the fund created be inadequate." 438 U.S. at 86-87. The Court held that "the Congressional decision to fix a $560 million ceiling at this stage in the development and production of nuclear power to be within permissible limits and not a violation of due process." 438 U.S. at 87.

The Court found the equal protection challenge unpersuasive in part because of the general rationality of the liability limitation in the context of a recovery mechanism designed for dealing with the conjectural possibility of a nuclear catastrophe involving large numbers of people and severe damages.[37]

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[37]The court declined to reach the Just Compensation Clause claim raised by the appellees because of the availability of the Tucker Act, 28 U.S.C. §1491. See 438 U.S. at 94, n.39.

The Tucker Act issue does not arise in this case. Whether the eradication of the jury's lawful award to appellant of $10 million punitive damages constitutes a taking of property without just compensation is squarely put before this Court by the holding that the state punitive damages statute and the jury's verdict under it are absolutely preempted.

The due process challenge was rejected in large part because of the Court's conclusion that the recovery mechanism provisions of the Price-Anderson Act provided a reasonably just substitute — a satisfactory *quid pro quo* — for the common law rights which would be lost if aggregate claims would exceed the $560 million ceiling. 438 U.S. at 88.

This case does not involve conjectural limitations of recovery rights or any reasonably just substitute for the rights supplanted. Here, a pre-existing common law right has been totally abrogated without any substitute for the rights lost. Appellant has had none of the benefits provided by Price-Anderson but has been left to the common law remedies "not known in modern times for either their speed or economy." 438 U.S. at 92. Moreover, the deprivation of rights and of property involved here is not speculative, but direct and immediate. A citizen has been deprived of a $10 million punitive damage verdict rendered by a jury to whose judgment appellant was Constitutionally entitled. The verdict was amply supported by the evidence and met the legal standards for the award of punitive damages under Oklahoma law.

This verdict has been nullified by an appellate court for this citizen, and punitive damages are henceforth to be denied to all citizens who may become victims of serious misconduct by nuclear facilities,[38] because of a general apprehension by the courts below that this state law remedy

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[38]Only four states — Washington, Louisiana, Nebraska and Massachusetts — do not allow punitive damages in tort. The effect of the decision below would be to invalidate the long-standing punitive damages remedy with regard to the most serious and unjustified torts by nuclear facilities.

would interfere with the federal regulatory program in some unspecified way. There is no rational basis for this serious deprivation of rights. Victims of nuclear torts would be denied both relief and protection which is available to all other citizens. Companies which handle radioactive materials would have a liability shield for their reckless or malicious conduct which no other companies enjoy.

Punitive damages are part of the full tort recovery rights provided by state law. They compensate the victim of reckless conduct for shouldering the burden of securing judicial redress which will protect the public at large. It is true that their primary purposes are deterrence and punishment rather than specifically to make an injured party whole. Punitive or exemplary damages are intended to punish a transgressor for the benefit and protection of the public. *Cox* v. *Theus*, 569 P.2d 447, 450 (Ok. 1977). This does not mean, however, that they can be denied without regard to due process or equal protection through the application of some kind of implicit right-privilege distinction.

Under Oklahoma law, whether punitive damages are to be awarded and, if so, in what amount are questions for the jury. See *Reed* v. *Fichencord*, 219 P. 937 (Ok. 1923); *Oller* v. *Hicks*, 441 P.2d 356 (Ok. 1967); *State ex rel Pollution, etc.* v. *Kerr-McGee Corporation*, 619 P.2d 858 (Ok. 1980). See also 22 Am.Jur.2d, Damages, § 341.

While the jury has discretion as to the award of punitive damages, the injured party has a right to the jury's consideration. If the legal requisites are met, it is reversible error for a trial judge to refuse to submit punitive damages

for a jury's consideration. *State ex rel Pollution, etc.* v. *Kerr McGee Corporation, supra, Oller* v. *Hicks, supra, Sopkin* v. *Premier Pontiac, Inc.*, 539 P.2d 1393 (Ok. App. 1975).

Punitive damages are for the jury's determination because within our system of justice the jury acts as the conscience and the watchdog of the community. Through the mechanism of punitive damages, juries can protect their fellow citizens from injurious conduct with the condemnatory and deterrent effects of a punitive damages verdict.

An absolute preemption of punitive damages precludes this history jury function and represents an interference with a basic feature of the justice system, not a mere denial of a windfall benefit. Moreover, this blanket denial of punitive damages directly injures the public interest which punitive damage awards are designed to protect.

Citizens who are victims of reckless or willful misconduct in other industries which are heavily regulated by the federal government[39] retain their rights to punitive damages if they can meet the evidentiary prerequisites. There is no valid basis in the Constitution, the Atomic Energy Act or overall national policy[40] for uniquely denying the right

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[39]For example, punitive damages, may be recovered against aircraft, automobile, drug and food manufacturing firms despite the heavy regulation of these industries by the federal government. Nor does the Consumer Product Safety Act preclude punitive damages for dangerously defective manufacturing practices in other industries.

[40]There is no barrage of outstanding punitive damages verdicts threatening the industry's solvency. Because of the enormous care and responsibilities required by the dangerous potential of radioactive materials, instances where there has been misconduct egregious enough to warrant punitive damages should, hopefully, be quite rare.

to recover punitive damages to those who are injured by reckless or willful misconduct by nuclear facilities.

CONCLUSION

A split panel of the Tenth Circuit Court of Appeals has held a state punitive damages statute preempted as repugnant to the Supremacy Clause of the U. S. Constitution and to the Atomic Energy Act. That holding qualifies this case for mandatory appellate review pursuant to 28 U.S.C. § 1254(2).

This case is plainly not one for summary affirmance. The unprecedented analysis and conclusion of the Court below and the inconsistency of the decision with prior rulings of this Court call for full appellate review.

The decision profoundly affects the rights of individual citizens as well as the authority of sovereign states, guaranteed by the Tenth Amendment of the U. S. Constitution, to protect their citizens by application of the state's laws.

The absolute shield against punitive damages granted below was never enacted by Congress — nor could it be passed by Congress. The public outcry would be too great. It was never claimed below by appellee or even by the nuclear industry's trade association, and this unprecedented immunity is not afforded to any other industries, including those heavily regulated by the Federal Government.

Because of the vast significance of this case and the legal and public policy questions raised by the decision

below, this Court should note probable jurisdiction and set this case for plenary review.

Respectfully submitted,

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APPENDIX

[Filed Dec. 11, 1981]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, Deceased, Plaintiff-Appellee,	)	
v.	)	
	)	No. 79-1894
THE KERR-McGEE CORPORATION, a Delaware corporation, and KERR-McGEE NUCLEAR CORPORATION, a Delaware corporation, Defendants-Appellants.	)	

Appeal from the United States District Court
For the Western District of Oklahoma
(D. C. No. CIV. 76-0888-T)

William G. Paul and Glenn W. McGee, Oklahoma City, Oklahoma, (L. E. Stringer, Richard C. Ford and John J. Griffin, Jr., of Crowe, Dunlevy, Thweatt, Swinford, Johnson & Burdick, Oklahoma City, Oklahoma; C. Lee Cook, Jr., William Van Hagey, Stephen A. Gorman and Pamela J. Kemplin, of Chadwell, Kayser, Ruggles, McGee & Hastings, Chicago, Illinois; and Elliott C. Fenton and Larry D. Ottaway of Fenton, Fenton, Smith, Reneau & Moon, Oklahoma City, Oklahoma, with them on the briefs) for Defendants-Appellants.

Arthur R. Angel, Oklahoma City, Oklahoma, (Jim Ikard, Oklahoma City, Oklahoma; G. L. Spence, Jackson Hole, Wyoming; and Daniel P. Sheehan, Washington, D. C., with him on the briefs) for Plaintiff-Appellee.

Harry H. Voight, Leonard M. Trosten and Michael F. McBride of LeBoeuf, Lamb, Leiby & MacRae, Washington, D. C., and Harvey S. Price, General Counsel for Atomic

Industrial Forum, Inc., Washington, D. C., filed a brief for amicus curiae Atomic Industrial Forum, Inc.

Karin P. Sheldon, Sierra Club Legal Defense Fund, Washington, D. C., filed a brief for amici curiae Environmental Policy Institute and Sierra Club.

Before DOYLE, McKAY and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

This is an appeal by Kerr-McGee Corporation and Kerr-McGee Nuclear Corporation (hereinafter collectively referred to as Kerr-McGee) from judgments after jury trial in a diversity suit brought against them by Bill M. Silkwood as administrator of the estate of Karen Silkwood, deceased. The action was based upon common law tort principles[1] under Oklahoma law, and sought damages for injuries (primarily fear and anxiety) suffered by Karen Silkwood during a nine-day period as a result of plutonium contamination occurring November 5, 6, and 7, 1974. Her death on November 13, 1974, in an unrelated automobile accident marked the end of any damages that might have been suffered had she lived beyond that date. The jury awarded $500,000 damages for these injuries and an additional stipulated $5,000 for property in her apartment that had to be destroyed because it was contaminated. In addition it awarded $10,000,000 punitive damages. The opinion of the trial court overruling Kerr-McGee's post-trial motions is reported at 488 F.Supp. 566 (W.D. Okl. 1979).

A number of issues are raised and argued on appeal, including applicability of the Oklahoma Workers' compen-

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[1] Civil Rights Act and federal constitutional claims were also asserted in the original petition. The trial court's dismissal of those claims was affirmed in a separate appeal. *Silkwood* v. *Kerr-McGee Corp.*, 637 F.2d 743 (10th Cir. 1980), *cert. denied*, ___ U.S. ___, 102 S.Ct. 132, 70 L.Ed.2d 111 (1981).

sation Act as the exclusive remedy, federal preemption, standard of care, applicability of strict liability, Availability of certain defenses, excessiveness of actual damages, invalidity and excessiveness of punitive damages, insufficiency of the evidence, and denial of a fair trial because of adverse publicity, prejudicial conduct of counsel, and errors in evidentiary rulings and instructions to the jury. We recite below such essential facts and treat such of these issues as are necessary to resolve all aspects of the appeal.

I. *Personal Injury*

Karen Silkwood was a laboratory analyst at the Cimmaron plant of Kerr-McGee located near Crescent, Oklahoma. The plant fabricated fuel pins containing plutonium for use as reactor fuel. Silkwood was contaminted by plutonium on November 5, 6, and 7, 1974, and the parties have stipulated that this plutonium came from the Kerr-McGee plant. Precisely how and when the contamination occurred is not stipulated and there is little evidence to fill this void.

Plutonium is an artificially produced radioactive chemical element which has been instrumental in the development of nuclear weapons and nuclear power. It emits alpha particles, beta particles, neutrons, gamma rays, and x-rays. The extent of radiation damage to human cells exposed to plutonium is dependent upon the amount of energy in the radiation. Alpha particles have the largest mass, carry the greatest amount of energy, and are the most hazardous. Damage can occur when alpha particles strike a cell. Damage to an individual cell is not, however, invariably harmful to the human body; a cell is capable of repairing itself and the body normally sheds and replaces millions of cells on a continuous basis. It is acknowledged, however, that plutonium is one of the most carcinogenic and dangerous substances known.

Silkwood was a member of the Oil, Chemical and Atomic Workers Union (OCAW), which represented some

of the workers at Kerr-McGee's plant. As an elected member of the union negotiating team, Silkwood was responsible for health and safety matters. In September 1974 she, together, with her fellow committee members, met with OCAW leaders in Washington, D. C., and presented charges to the Atomic Energy Commission (AEC) of numerous health and safety violations by Kerr-McGee. The AEC required documentation of the charges, and Silkwood was assigned the job of collecting this documentation. Silkwood was engaged in collecting information and recording it in notebooks and on tapes from September 1974 until the time of her death.

There is no real dispute in the evidence concerning Silkwood's contamination. She reported to work at the Cimmaron plant on November 5, 1974, at 1:20 p.m. At 2:45 p.m. and at 3:15 p.m., before and after taking a break, Silkwood monitored herself with plutonium detecting devices provided by Kerr-McGee in accordance with the company policies and AEC license requirements. No plutonium was detected on her person. At about 3:45 p.m. Silkwood began to work in two glove boxes containing plutonium. A glove box is a supposedly impervious box surrounding the plutonium processing equipment which has glove holes permitting the operator to work on the equipment or with the plutonium from outside the box. Silkwood again monitored herself before and after her break at 5:30 p.m. and at 5:45 p.m., and at those times detected no contamination. She continued to work in the glove boxes and, upon withdrawing her hands from one of the boxes at about 6:30 p.m., she found contamination. Further checks were made in the laboratory and other contaminations were found, particularly inside the gloves in the glove box in which Silkwood had been polishing and cleaning plutonium.

Contamination was found on Silkwood's left hand, right wrist, upper arm, neck, face, hair, and in her nostrils. Pursuant to regulations, Silkwood was immediately decontaminated and placed on a five-day voiding collec-

tion program, and furnished urine and fecal kits to take home for the purpose of obtaining samples which would be sent to the United States testing laboratory for analysis. Later that day Silkwood returned to work, but not to the glove boxes, she monitored herself when she left work at about 1:10 a.m. and found no contamination. The glove box was later tested by the AEC investigators, and no leaks were found. Further, the investigators found no significant airborne contamination in the laboratory.

The next day, November 6, 1974, Silkwood arrived at work at 7:50 a.m., and did some paper work in the lab until 8:50 a.m., at which time she left to attend a union meeting. At that time she tested herself and found contamination on her hands; tests showed fixed contamination on her right forearm, face, and neck. Her hands were decontaminated; since the other spots appeared to be fixed contamination she was allowed to attend the union meeting. She returned to the health office at 4:30 p.m., where slight contamination was found on her right forearm, neck and face, and in her nostrils. She was again decontaminated and, at her request, her locker and auto were tested and found to be free of contamination.

On November 7, 1974, when she reported to work Silkwood went directly to the plant's health physics office. She was found to be contaminated in her nostrils and on her hands, arms, chest, back, neck and right ear. Four urine and one fecal sample collected on November 5th, 6th and 7th were found to be contaminated, although the exterior of the kits showed no contamination. The parties stipulated that urine samples brought to the plant had been spiked with plutonium; that is, they contained insoluble, not naturally excreted, plutonium. Also, Silkwood's apartment was found to have been contaminated, with highest concentrations of plutonium found in the bathroom and on a package of bologna and cheese in the refrigerator.

Silkwood's roommate, Sherri Ellis, was also a laboratory analyst at Kerr-McGee, and was found not to be con-

taminated when she left work at 8:00 a.m. on November 7th after working a midnight shift. After returning to the apartment, Ellis used the bathroom and retired to her bedroom. Subsequent checks revealed contamination of Ellis' buttocks and hands. Ellis' auto and the refrigerator where her lunch had been placed in the plant lunchroom were free of contamination. Silkwood's boyfriend, who spent the night of November 6th in Silkwood's apartment, had left the apartment at about 7:00 a.m., on November 7th after using the bathroom. Neither he, his car, nor his residence were contaminated.

Silkwood's possessions were destroyed and Silkwood was sent to the Los Alamos Scientific Laboratory in New Mexico to undergo further tests concerning her contamination. She reported back to work on November 13th at which time she was reassigned. She participated in a union negotiating session that day, met with AEC inspectors concerning her contamination, and attended a union strategy session. On her way to meet a *New York Times* reporter and an OCAW leader, Silkwood was killed in an automobile accident. A subsequent autopsy revealed that the amount of plutonium within Silkwood's body at the time of her death was between 25% and 50% of the permissible lifetime body burden allowed by the AEC for plutonium workers.

Silkwood made statements that she had spilled her urine sample in her bathroom between 7:00 and 7:50 a.m. on November 7th, after her boyfriend left and before her roommate returned to the apartment from work. Silkwood stated that at the time she spilled the urine sample, a package of bologna was on top of the commode, where she had placed it in anticipation of preparing a sandwich to take to work. Following the spilling of the sample, Silkwood stated that she wiped off the bathroom floor with a tissue and placed the bologna back in the refrigerator. That evidence was admitted only to show Silkwood's state of mind, motivation, or intention relevant to the issue whether

she intentionally removed the plutonium from the plant; it was not admitted to show the truth of the statements.

The only other evidence supporting inferences relevant to where and how Silkwood was contaminated is as follows. Except for the fact that Silkwood was in a radiation zone for an hour on November 6 before discovering contamination on her person, and Silkwood's statement that she thought she was inadequately decontaminated on November 5, there is no evidence of where, when or how she became contaminated on November 6th. She did not work the glove boxes that day and no other contamination was observed. Apparently employees were not monitored for radiation upon arriving at work, although they were subject to self and other monitoring each time they removed their hands from glove boxes and when exiting rooms and air locks. Evidence showed Silkwood was sloppy in her safety habits, failing to monitor herself or tuck her hair into the cap she was required to wear in the laboratory.

The insoluble plutonium used to spike the urine samples was not of the same batch Silkwood was working with in the glove boxes at the time of her exposures. The material could have come, however, from a slot box in the laboratory area to which Silkwood and other Kerr-McGee employees had access. The Kerr-McGee inspection system would not detect amounts of plutonium of less than about 1/2 gram taken from the plant in a nonmetallic container. (The amount in Silkwood's apartment was estimated at less than .0003 gram.)

There was evidence that Kerr-McGee's supervisory employees knew Silkwood was attempting to gather evidence of Kerr-McGee's negligent and improper practices in the operation of the plant and that some disapproved of her and these activities. There was also evidence that Silkwood was unhappy with a reprimand she had received shortly before her November 5 contamination and that she wanted to embarrass Kerr-McGee.

In an obvious attempt to avoid application of the workers' compensation law, the complaint asserted that all exposures originated in Silkwood's apartment. A pretrial motion for summary judgment based upon the exclusive application of the workers' compensation law was properly denied because factual issues had not been resolved as to how the exposure occurred. The Kerr-McGee assertion that workers' compensation applied to the personal injuries was reasserted at the conclusion of the case and in the motion for judgment n.o.v. The trial judge's refusal to grant the motions or to instruct the jury on the workers' compe sation issue was based upon his view that Kerr-McGee had the burden of proving job relatedness of the contamination and that there is no presumption upon which Kerr-McGee was entitled to rely.

As the trial judge recognized, there was absolutely no evidence that someone other than Silkwood or a Kerr-McGee employee intentionally or accidentally exposed Silkwood to plutonium contamination. No intentional contamination, either by Silkwood or Kerr-McGee, was established. The judge properly refused to give a jury instruction on intentional contamination by action of a Kerr-McGee employee, for lack of credible evidence. The evidence that Kerr-McGee employees might have disliked Silkwood and her evidence-gathering activities and that plutonium could and did escape the plant is not enough to support a finding that Kerr-McGee operatives intentionally exposed Silkwood to contamination. The only plausible method by which Kerr-McGee could intentionally contaminate Silkwood would be by placing plutonium in the urinalysis kits it sent home with her; there is no evidence to support such a theory. The court gave an instruction permitting the jury to find whether Silkwood intentionally removed plutonium from the plant. The jury found she did not. We agree that sufficient evidence was presented to support the court's instruction, and that the evidence was not so strong as to require the jury to find Silkwood intentionally took the plutonium.

The trial court refused for lack of evidence to summit to the jury the issue of an accidental contamination of Silkwood. Here we disagree. Indeed, we hold that, in light of the lack of evidence of intentional contamination by Kerr-McGee operatives, Silkwood, or others, the presumptions and burdens of proof applicable to workers' compensation issues required the court to grant judgment n.o.v. holding that workers' compensation was the exclusive remedy for personal injuries suffered by Silkwood.

The Oklahoma Workers' Compensation Act, Okla. Stat. Ann. tit. 85 (West 1971 & Supp. 1980), provides that the employer shall pay compensation "for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment . . ." *Id.* § 11. Section 12 of the Act provides that the liability prescribed in section 11 "shall be exclusive and in place of all other liability of the employer and any of his employees, at common law or otherwise . . ." Section 27 clarifies the scope of coverage indicated in section 11 by creating a presumption. "In any proceeding for the enforcement of a claim for compensation under this act, it shall be presumed in the absence of substantial evidence to the contrary: 1. that the claim comes within the provisions of this act." *Id.* § 27.

No Oklahoma case addresses directly the question whether an employer as well as an employee may invoke the presumption of coverage. But the courts that have construed similar liberal construction rules have unanimously held that the same rules of coverage apply regardless of who seeks their application. *See Arnold* v. *Shell Oil Co.*, 419 F.2d 43 (5th Cir. 1969); *Jackson* v. *Southern Pac. Co.*, 285 F.Supp. 388 (D.Nev.1968); *Freire* v. *Matson Nav. Co.*, 19 Cal.2d 8, 118 P.2d 809 (1941); *Wilburn* v. *Boeing Airplane Co.*, 188 Kan. 722, 366 P.2d 246 (1961); *Thibodaux* v. *Sun Oil Co.*, 40 So.2d 761 (La.App.1949), *aff'd*, 218 La. 453, 49 So.2d 852 (1950); *Smith* v. *Alfred Brown Co.*, 27 Utah 2d 155, 493 P.2d 994 (1972).

There are persuasive reasons underlying these consistent holdings. As pointed out by the *Freire* decision, the liberal construction in favor of jurisdiction is not intended merely to ensure the benefits of the act for injured employees, thus sparing them the necessity of expensive and speculative trials; it is also intended to protect the employer from excessive judgments. 118 P.2d at 810. *See Jackson* v. *Southern Pac. Co.*, 285 F.Supp. at 389. We believe the Oklahoma Supreme Court holdings are in accord with this principle. In one case which held that an insurer's right to subrogation was abrogated by the Workers' Compensation Act, that court stated:

> "[W]e think the Workmen's Compensation Act, in effect, was reciprocal in eliminating common-law rights, it was compensatory to both employer and employee. To the employee the act provided a summary action, it insured the workmen a living wage, when injured. As to both, it took away a jury trial. As to the employer, it created a maximum loss as well as making the amount of recovery certain."

Fox v. *Dunning*, 124 Okl. 228, 255 P. 582, 585-86 (1927).

Most recently, in the case of *Harter Concrete Products, Inc.* v. *Harris*, 592 P.2d 526 (Okl.1979), the Oklahoma Supreme Court held that an employer could not be joined in a product liability action as a third party defendant because workers' compensation was the exclusive remedy.

> "Worker's compensation legislation was enacted to provide a substitute remedy to an employee for accidental injuries received during covered employment without the burden of his proving negligence. In exchange for this exposure the employer is protected from any other liability to the employee. To be equitable as well as effective, this protection must extend to *all* liability either directly or indirectly derived from the employee's injuries."

Id. at 528 (footnotes omitted) (emphasis in original).

Another reason given for an evenhanded application of the presumption is that the objective of doing equal justice cannot be attained absent a consistent application of the rules. *See Buhler* v. *Gossner*, 530 P.2d 803, 805 (Utah 1975); *Smith* v. *Alfred Brown Co.*, 27 Utah2d 155, 493 P.2d 994, 995 (1972).

Against this persuasive authority, plaintiff argues that the prefatory language to section 27 compels a decision that an employer may not avail itself of the presumption in proceedings brought outside those described in the Act. This key language provides the presumption will apply "[i]n any proceeding for the enforcement of a claim for compensation under this act . . ." Okla. Stat. Ann. tit. 85, § 27. We believe that plaintiff's construction would not only violate the aforementioned principles enumerated by other jurisdictions, but would also destroy the exclusive jurisdiction compelled by the Act. Were the presumption to be applied only when an employee brought a claim in the Workers' Compensation Court, then a certain number of borderline cases would be sustained only by operation of the presumption. If these same cases were brought at common law and were deemed not subject to the presumption, they would be found to be outside the Act. Thus, an overlapping jurisdiction would exist for a number of cases open to the election of the employee. Such a result seems to contradict the Act's clear intent, expressed in section 12, of limiting recovery to that provided in the Act for all cognizable claims. *See, Arrington* v. *Michigan-Wisconsin Pipeline Co.*, 632 F.2d 867, 871 (10th Cir. 1980). For these reasons, we believe the Oklahoma Supreme Court would hold that the presumptions contained in section 27 are applicable regardless of who seeks to make use of them.

We agree with plaintiff that inasmuch as exclusive jurisdiction is an affirmative defense, Kerr-McGee had the burden of producing evidence sufficient to demonstrate that the injuries were covered by the Act. *See Oklahoma Steel Casting Co.* v. *Banks*, 181 Okl. 503, 74 P.2d 1168 (1937).

The method of proving that an injury arose out of and in the course of employment would be the same regardless of whether it is offered by the employee to prove a claim or by the employer seeking to bar an action at common law. *See Eckis* v. *Sea World Corp.*, 64 Cal.App.3d 1, 134 Cal. Rptr. 183 (1976). The method by which injuries occurring under somewhat mysterious circumstances are proven is outlined in *In re May*, 586 P.2d 738 (Okl. 1978). In that case, representatives of a driver of a service vehicle sought recovery for the death of the driver who was found shot to death in a rural field. His log indicated that he had completed his route. The Supreme Court of Oklahoma rejected the employer's contention that because there was no competent evidence to indicate that the death arose out of and in the course of employment, the compensation award was in error. Relying on *In re Martin*, 452 P.2d 785 (Okl. 1969) and *Nebo Oil Co.* v. *Wright*, 406 P.2d 266 (Okl. 1965), the court first noted that compensation law indulges a presumption that a claim for injury is within the Act absent substantial evidence to the contrary. Any reasonable doubt is to be resolved in favor of the claimant. 586 P.2d at 740. Second, the court noted that the claimant could meet his burden of producing competent evidence that the injury occurred during the course of employment by use of circumstantial evidence. The circumstantial evidence need not exclude every other possible inference, but is only required to provide a legal and logical basis for a reasonable inference as to the existence of the fact sought to be proven. *Id.* at 740-41. Once this reasonable inference of coverage is established, a prima facie case has been made out that workers' compensation is the exclusive remedy, and it is then incumbent upon the plaintiff to show the nonexclusivity of the statutory compensation remedy as to each element of the injuries for which plaintiff seeks common law relief. *Murphy* v. *Owens-Corning Fiberglas Corp.*, 447 F.Supp. 557, 571 (D.Kan. 1977).

With these rules in mind, we again review the evidence. Silkwood was a laboratory analyst at the Kerr-McGee plant and handled plutonium in the regular course of her employment. It is undisputed that on the first day of her contamination, November 5, 1974, Silkwood was found to be contaminated after spending some three hours grinding and cleaning plutonium. Silkwood had monitored herself three times during the course of the same work period and found no contamination each time. After Silkwood was found to be contaminated, the gloves in the glove box she had been using were found to be contaminated. Silkwood was decontaminated at work and given urine and fecal kits to check for plutonium discharges. This is the only evidence relating to the November 5th exposure and it supports only one inference: that the exposure was job-related.

Of the three exposures occurring on November 5th, 6th and 7th, that of November 6th is the least understood in terms of when and where it happened. On November 6th, Silkwood arrived at work at 7:50 a.m. and performed paperwork in the laboratory, which was in a radiation zone. Apparently she was not checked for contamination at the time she arrived at work, but upon leaving the laboratory at 8:50 a.m., she checked herself and discovered contamination on her hands, her right forearm, and her face and neck. Her hands were decontaminated immediately, but to permit Silkwood to attend a union meeting the fixed contamination on the rest of her body was not decontaminated until the end of the day. At most this evidence could support an inference that the November 6th exposure occurred at the job site which was known to be a place where plutonium was present. Alternatively, the evidence might support a finding that, as Silkwood stated, the contamination discovered on November 6th was residual contamination from her on-the-job exposure of the day before. Any other inference would be far too speculative based on this record.

Upon her arrival at work the next day, November 7th, Silkwood was found to be highly contaminated. The urine sample she took that morning at her apartment was spiked and her apartment was found to be contaminated, particularly the bathroom, kitchen, and her bedroom. Her roommate was found to be contaminated on her buttocks and hands. The only reasonable explanation for the roommate's contamination is that it came from the toilet in the apartment after Silkwood had taken her urine sample and departed for work. In view of the lack of contamination of other individuals who occupied the apartment during the course of the evening of the 6th and until 6:50 a.m. on the morning of the 7th, the only reasonable inference that can be drawn from the circumstantial evidence is that the contamination of the apartment, Silkwood, and her roommate resulted from Silkwood's preparation that morning of the urine sample. It is undisputed that the urine sample was spiked, although it is not known who spiked it or from what source. Since the urine sample was prepared at the direction of her employer as a part of her job-related duties, the only inference not based on the sheerest speculation that can be drawn from the evidence is that the contamination measured on the 7th was also job-related. The only other evidence that properly can be considered leads to the same conclusion.[2]

The circumstantial evidence supports one conclusion: that Silkwood's exposure on all three occasions occurred either at the job site or in preparation of urine samples

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[2] Silkwood told AEC investigators that she believed the contamination measured on the 7th resulted from inadequate decontamination at work the day before. If this were true, it proves only that the contamination of the 7th was job-related. Furthermore, her statement about being contaminated while preparing her urine sample on the morning of the 7th, although not admitted to prove the truth of the statement, is consistent with the only reasonable inferences that can be drawn from the balance of the evidence.

for her employer. In the absence of any other evidence of offsite exposure,[3] the only reasonable inference is that all the plutonium found in her body came from her working with and around plutonium or from the preparation of job-related urine samples that were spiked. Plaintiff's own expert witness testified that no one could be sure when the exposure occurred that resulted in the deposition of plutonium in Silkwood's lungs.

While the circumstantial evidence as to the time, place, and manner of exposure is thin at best, it cannot support any conclusion other than that the exposures were job-related. Even were we to conclude that the evidence is too thin standing alone to support any conclusion, we are satisfied that, aided by the liberal construction rule favoring coverage, Kerr-McGee has established a prima facie case that the injury comes within the provisions of the workers' compensation statute. We now hold that plaintiff has not produced substantial evidence that Silkwood's injury occurred outside the course of her employment to rebut this prima facie case.

The trial court's comparison of this case to that of a factory worker engaged in the manufacture of television sets who is injured when his home television blows up is inapposite. In that case the reasonable inference is that the television is for private use, and no circumstance suggests that the explosion is related to his work rather than his ownership of the set. In the instant case, by contrast, there is a logical nexus between Silkwood's injury and her work.

Silkwood's counsel complained that Kerr-McGee's evidence was all directed to prove intentional taking by Silkwood and self-contamination. It is true that in pretrial

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[3] There was evidence that a substantial amount of Kerr-McGee plutonium was missing from the job site but no evidence, circumstantial or otherwise, connects Silkwood with that material.

investigations and at trial Kerr-McGee employees testified to beliefs and theories that no incident at the plant had been the source of the contamination, that the contamination was self-administered, that it was unlikely to have been accidental, or that she was contaminated offsite. While Kerr-McGee attempted to establish an intentional taking of plutonium by Silkwood and intentional or accidental self-contamination thereafter, it never abandoned the alternative theory of a job-related accident. Kerr-McGee could avoid liability altogether if it could establish an intentional taking by Silkwood; it could avoid a common law tort claim for personal injuries if it could establish a job-related accidental exposure. We do not consider its witnesses' statements concerning self-contamination by Silkwood as admissions that no job-related accidental exposure was possible.

Plaintiff contends that the Workers' Compensation Court has exclusive jurisdiction only if it is shown that the worker would actually have received compensation and, since it was not shown that Silkwood's injury was presently disabling, no compensation would have been awarded. Plaintiff argues that because section 12 provides that "[t]he *liability prescribed* in the last preceding section shall be exclusive" and section 11 prescribed only liability for disability or death, all non-disabling injuries may be pursued at common law. Kerr-McGee counters with an argument there was no injury to Silkwood here at all, since she did not contract cancer during her life. This Court has recognized that a complaint based upon the possibility of contracting cancer in the future as a result of past exposure to a carcenogenic substance does not state a common law cause of action. *Bussey* v. *Safeway Stores, Inc.*, (10th Cir. Sept. 19, 1978). Of course, a claim for illness already suffered is cognizable. *Id.*

Here Kerr-McGee was entitled to a finding that Silkwood's contamination was on the job, as we have discussed above. If cancer is developed from a radiation exposure

on the job, the workers' compensation law covers it. *See* Okla.Stat.Ann. tit. 85 § 11(4) (West Supp. 1980) (with reference to Okla.Stat.Ann. tit. 85 § 3(7),(10) (West Supp. 1980). In the instant case the radiation produced hysteria and fear in Silkwood and the need for medical treatment and examination. The Workers' Compensation Act requires reimbursement for medical attention from job-related accidents. *Id.* § 14. Silkwood missed time from work at least during testing, and she incurred medical expense, paid by Kerr-McGee. But even if she had not, work time loss and medical expense are not necessary requisites to finding an injury is exclusively covered by workers' compensation. If a worker on the job received a hammer blow to the thumb causing pain and suffering but no time loss, surely he or she could not sue the employer in a common law tort action. We believe the Oklahoma Supreme Court would hold that any accidental injury incurred on the job would be covered by the Workers' Compensation Act, and that the radiation exposure here is such a case. The fact the Act does not compensate for every aspect and degree of the injury makes no difference. In *Smith* v. *Baker*, 157 Okla. 155, 11 P.2d 132 (1932), a case in which a man lost his sexual organs in the course of employment, the Supreme Court of Oklahoma said, "The fact that Workmen's Compensation Act does not provide adequate relief in all cases does not authorize a civil action for recovery of damages." The Oklahoma court is in agreement with other jurisdictions that have considered this issue. *See* 2A Larson, *Workmen's Compensation* § 65.20 (1976).

We have considered plaintiffs' other contentions in regard to this issue, and find them to be without merit. We conclude the court erred in not ruling that the issue of personal injury must be determined under the Workers' Compensation Act. Our disposition on this issue eliminates the need to discuss the sufficiency of the evidence and other arguments relating to the amount of damages for personal injury and the fairness of the trial on that aspect of the case. We do not understand Kerr-McGee to contend that

the federal regulation of nuclear energy preempts application of the workers' compensation law for injuries on the job. *See* Appellants' Brief p. 56 n.*. *See also* S.Rep. No. 296, 85th Cong., 1st Sess., *reprinted in* [1957] U.S.Code Cong. & Ad. News 1803, 1819.

II. *Property Damage*

The existence here of significant damage to Silkwood's personal property in her apartment requires us to consider additional issues raised in the appeal. The Workers' Compensation Act applies only to "accidental personal injury." Okla.Stat.Ann. tit. 85, § 11 (West Supp. 1980). *See also id.* §§ 2, 3(7).

Kerr-McGee argues that the pervasive federal regulation of atomic energy precludes states from applying stricter safety standards for the handling of nuclear materials than required by AEC regulations. As applicable to the issue of its liability for actual damage to Silkwood's personal property, Kerr-McGee asserts that its substantial compliance with preemptive federal regulations is conclusive evidence of due care and precludes holding it liable under a strict liability standard.

Northern States Power Co. v. *Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035, 92 S.Ct. 1307, 31 L.Ed.2d 576 (1972), upon which Kerr-McGee places its principal reliance, declared that federal preemption precludes a state from exercising regulatory authority over the discharge of radioactive effluents from nuclear power plants in the state. *See also Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed. 2d 434 (1976). As *Northern States* recognizes, the determination whether the federal scheme precludes state rules is primarily a matter of the intent of Congress. Imposing a state tort law rule of strict liability for nuclear-related property damage occurring off the plant site might, in some instances, encroach upon federal regulations setting effluent or other standards. *See State Dept. of Environ-*

mental Protection v. *Jersey Central Power & Light Co.*, 69 N.J. 102, 351 A.2d 337 (1976); *Van Dissel* v. *Jersey Central Power & Light Co.*, 152 N.J. Super. 391, 377 A.2d 1244 (1977). We do not think imposition of tort liability in the instant case, in which a quantity of plutonium has escaped the plant site and caused damage, will significantly interfere with federal regulation of Kerr-McGee's plant. Further, the AEC (now Nuclear Regulatory Commission (NRC)) does not have power, except as it is involved in the administration of the Price-Anderson Act, to order a compensatory award to a victim of a nuclear incident. *See Marshall* v. *Consumers Power Co.*, 65 Mich.App. 237, 237 N.W.2d 266 (1975). Clearly there is need for such a remedy. The Supreme Court and Congress have recognized that state tort law principles are applicable to some extent in off-site damage cases. In upholding the constitutionality of the Price-Anderson Act, the Supreme Court stated that "[a]ppellees' only relevant right prior to the enactment of the Price-Anderson Act was to utilize their existing common-law and state-law remedies to vindicate any particular harm visited on them from whatever sources." *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 88 n.33, 98 S.Ct. 2620, 2638 n.33, 57 L.Ed.2d 595 (1978). The Price-Anderson Act, 71 Stat. 576 (1957) (codified in scattered sections of 42 U.S.C.), was passed to address the problem of liability for nuclear disasters which might deter the industrial development of nuclear energy. It requires AEC (NRC) licensees to purchase private insurance, creates a government indemnity fund, and establishes maximum limits to liability for an "extraordinary nuclear occurrence." 42 U.S.C. § 2210(n). For nuclear incidents below the level of an extraordinary nuclear occurrence, and the instant case is one, the rules of tort law of the state in which the injury occurred still apply.

> "[T]he bill has been drafted so that minor claims involving nuclear facilities or materials may remain subject to the traditional rules of tort law."

S.Rep. No. 1605, 89th Cong., 2d Sess., *reprinted in* [1966] U.S.Code Cong. & Ad. News 3201, 3211. *See also id.* 3203-04, 3206, 3207, 3209, 3226; S.Rep. No. 296, 85th Cong., 1st Sess., *reprinted in* [1957] U.S.Code Cong. & Ad News 1803, 1810, 1823. Kerr-McGee argues that although state tort law applies the federal regulations determine the controlling standards, foreclosing application of strict liability. But that same Senate report recognizes that a state can apply strict liability principles if it chooses.

> "[A] claimant would have exactly the same rights that he has today under existing law — including perhaps, benefit of a rule of strict liability if applicable State law so provides."

S.Rep. No. 1605, 89th Cong., 2d Sess., *reprinted in* [1966] U.S.Code Cong. & Ad. News at 3212. *See also id.* 3203, 3206, 3207.

We have no doubt Oklahoma courts would apply strict liability to this case of escape of plutonium, a highly toxic and dangerous substance. *Young* v. *Darter*, 363 P.2d 829 (Okl. 1961) (herbicide spray). *See also Kirkland* v. *General Motors Corp.*, 521 P.2d 1353 (Okl. 1974). Nuclear energy is surely an area "in which no court will, at last, refuse to recognize and apply the principle of strict liability." W. Prosser, *The Law of Torts*, § 78, at 516 (4th ed. 1971); *see Restatement (Second) of Torts* § 520, comment (g) (1977) ("Some activities, such as the use of atomic energy, necessarily and inevitably involve major risks of harm to others, no matter how or where they are carried on").

We have no trouble with proximate cause in the context of damage to personal property in Silkwood's apartment. It was stipulated that the plutonium came from the Kerr-McGee plant; clearly the property damage was the result of plutonium contamination. Regarding one who carries on an abnormally dangerous activity. *Restatement*

(Second) of Torts § 519, comment (e) (1977) states that strict liability applies to "harm that is within the scope of the abnormal risk that is the basis of the liability." The key is foreseeability. It is surely foreseeable and within the scope of the abnormal risk that radiation contamination will occur from contact with plutonium that escapes a nuclear fuel plant. Just as the risk incident to dynamite is accidental explosion, a risk incident to plutonium is accidental contamination. The jury's finding that Silkwood did not intentionally carry the plutonium from the plant to her apartment eliminated the only possible intervening cause for which any evidence was presented.

Since strict liability applies and the stipulated amount of the property damage was $5,000, claims of prejudicial publicity and other alleged trial errors would have no application to this property damage claim. While evidence excluded by the trial court concerning the state of Silkwood's health might be relevant to her personal injuries, it does not seem relevant to the jury's finding that she did not deliberately remove the plutonium from the plant. Therefore, we find no error in the judge's direction to the jury to return in its verdict $5,000 in damages for the personal property if it found no intentional taking of the plutonium by Silkwood.

III. *Punitive Damages*

Kerr-McGee makes several argument that the award of punitive damages is improper. We need consider only one, the claim of federal preemption.

As discussed above, the Price-Anderson Act contemplates that state tort law applies in at least some cases involving nuclear incidents; we have found that a claim for compensatory damages for off-site contamination caused by the escape of plutonium is one such situation. Nowhere in the Price-Anderson Act or its legislative history have

we found express mention of punitive damages. References in the Price-Anderson Act that state law may determine tort liability may be read to permit punitive as well as compensatory damages in states like Oklahoma which permit them. However, with respect to "extraordinary nuclear occurrence" which are covered by statutory insurance, indemnity fund, and liability limitations, the Price-Anderson Act implicitly assumes that only compensatory damages will be awarded. *See also Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 93, 98 S.Ct. 2620, 2640, 57 L.Ed.2d 595 (1978), ("The Price-Anderson Act not only provides a reasonable, prompt, and equitable mechanism for *compensating* victims of a catastrophic nuclear incident, it also guarantees a level of net *compensation* generally exceeding that recoverable in private litigation.") (Emphasis added.)

More importantly, punitive damages are "awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." *Restatement (Second) of Torts*, § 908(1) (1979). *See also City of Newport* v. *Fact Concerts, Inc.*, ____ U.S. ____, 101 S.Ct. 2748, 2759, 69 L.Ed.2d 616 (June 26, 1981). Thus there is a deterrent or regulatory effect in punitive damages, which the trial judge explicitly recognized in the instant case. In jury instruction number 19 the court directed the jury that it "may give damages for the sake of example and by way of punishment," noting that punitive damages are allowed "both as a restraint upon the transgressor and as a warning and example to deter the commission of like offenses in the future." 485 F.Supp. at 603. In denying Kerr-McGee's motion for judgment n.o.v., the court mentioned the substantial evidence of poor training, poor security, and indifference to hazards. *Id.* at 591. The court's general treatment of the punitive damages issue clearly demonstrates its approval on the basis that Kerr-McGee so negligently and indifferently operated the plant that punitive damages were appropriate to punish

Kerr-McGee and to deter it and others from similar bad practices in the future.

The problem with awarding punitive damages in this case, however, is that *Northern States* read the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2284, particularly section 2021, as preempting state regulation of radiation hazards resulting from atomic energy development. The Supreme Court accepted the Eighth Circuit's conclusion that "Congress intended to pre-empt the field of the licensing and regulation of nuclear reactors to the exclusion of the states and . . . did not intend to provide for dual regulation of radiation hazards, even as to those activities which could be turned over to the states." 447 F.2d at 1151. *Northern States* traced the history of atomic energy development in the United States from a government monopoly through the congressional decision, effectuated in the Atomic Energy Act of 1954 with its subsequent modifications and additions, to encourage private industry to participate. Specifically, the decision held that Minnesota could not impose state licensing requirements to regulate radiation emissions from nuclear power plants in that state.

Other cases have recognized the strong federal interest in atomic energy development. In *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 17, 96 S.Ct. 1938, 1945, 48 L.Ed.2d 434 (1976), the Supreme Court appears to have reaffirmed its memorandum holding in *Northern States* by ruling that the Atomic Energy Commission (now NRC) has exclusive control over the discharge of nuclear materials. In *United States* v. *City of New York*, 463 F.Supp. 604 (S.D.N.Y. 1978), the court found that federal preemption precluded New York City from licensing nuclear reactors in the city. Although recently the Ninth Circuit upheld California's statutes requiring state approval of proposed nuclear plants and their locations within California, it recognized Congress's intent to assert exclusive federal control over radiation hazards associated with nuclear energy. *Pacific Legal Foundation* v.

State Energy Resources Conservation and Dev. Comm'n, Nos. 79-3365, 79-3382, 80-4265 & 80-4273 (9th Cir. Oct. 7, 1971).

Arguably there should be a strong presumption against preemption of state laws affecting such vital interests of its citizens as those involved in the instant case. However, the nuclear industry was initially developed by the federal government, is closely linked with national security, and is extensively regulated by a federal agency. This apparently is the basis upon which *Northern States* was decided. *See* Note, *A Framework of Preemption Analysis*, 88 Yale L.J. 363, 379-81 (1978). We cannot read that case and *Train* other than as requiring us to hold invalid any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material. A judicial award of exemplary damages under state law as punishment for bad practices or to deter future practices involving exposure to radiation is no less intrusive than direct legislative acts of the state. Thus we hold punitive damages may not be awarded in this case.

It does not matter whether Kerr-McGee violated AEC regulations in the conduct of its plant operations. The AEC (NRC) has comprehensive powers to punish and prohibit practices it regards as improper, through its power and responsibility to license, 42 U.S.C. § 2131, investigate, *id.* § 2271, enjoin, *id.* § 2280, and seek civil and criminal penalties. *Id.* §§ 2272, 2273, 2282.

We need not consider other alleged errors asserted by Kerr-McGee in its appeal. The decision is affirmed in part and reversed in part and remanded to the district court for further considerations consistent herewith.

WILLIAM E. DOYLE, Circuit Judge, dissenting.

I disagree with most, but not all, of the points which are developed in the majority opinion. I disagree also with the result reached. I have no disagreement with the affirmance of the award of $5,000 to the estate of Karen Silkwood based upon destruction of her furniture and belongings.

I.

Alleged Exclusiveness of the Remedy of Workmen's Compensation

From the fact that the statute presumes in favor of the existence of a workmen's compensation remedy where an employee is injured and makes a claim, the majority opinion reaches the conclusion that this presumption is also available to the Company where the employee has not made a claim. No such suggestion is made in the statute. Authority in support of this position is either meagre or non-existent.

The first issue to be considered is whether the workers' compensation remedy is exclusive as a matter of law under the facts in the record. Kerr-McGee's position is that the evidence and the law call for liberal construction in favor of coverage and that, therefore, the exclusive remedy was that under workers' compensation. The cases say that the Act is not to be given a narrow, restricted meaning and must receive broad and liberal interpretation in order to realize its intent; reasonable doubt as to whether the injury arose out of and in the course of employment is to be resolved in favor of an injured workman. *City of Nichols Hills* v. *Hill*, 534 P.2d 931, 934 (Okl.1975); *Murphy* v. *Owens-Corning Fiberglas Corp.*, 447 F.Supp. 557, 571 (D. Kan. 1977), *aff'd*, 78-1082 (10th Cir. July 13, 1979).

Workers' Compensation as an Issue of Fact

Alternatively, however, Kerr-McGee maintains that it was entitled to have the workers' compensation issue submitted to the jury. The argument is that the trial court erred in refusing to instruct the jury on the subject of workers' compensation inasmuch as Oklahoma law provides for jury determination of the coverage question where the evidence is conflicting. The Oklahoma courts have held that, in a common law tort action where the worker's compensation defense is raised, the jury must be instructed on the defense unless as a matter of law only one inference can be drawn from the evidence: "where there is room for a reasonable difference of opinion as to the proper inference to be drawn from the known facts, the issue [of worker's compensation] is for the jury under proper instructions by the court." *Flick* v. *Crouch*, 434 P.2d 256 (Okl. 1967).

Oklahoma considers the question as one of fact for the jury where a question exists as to whether the injury occurred on the job or, on the other hand, away from the job.

Analysis of the Evidence

Three incidents in which Silkwood was shown to have had plutonium contamination are established by the evidence. The resulting inferences indicate that the sources of the contamination were both Silkwood's apartment and the Kerr-McGee laboratory. Since neither place was an exclusive source, the issue qualified as a factual dispute.

The first of the three incidents occurred on November 5, 1974 at 1:20 p.m. when Silkwood reported for work. At 2:45 and 3:15, before and after taking a break, Silkwood monitored herself with a plutonium detecting device provided by Kerr-McGee in accordance with the AEC requirements. No plutonium was detected on her person at that time. However, about 3:45 p.m. Silkwood began to

work in two glove boxes which contained plutonium. A glove box is a supposedly impervious box surrounding the plutonium processing equipment which has glove holes allowing the operator to work on the equipment with the plutonium from outside the box. When Silkwood monitored herself at 5:30 p.m. and 5:45 p.m., no contamination was detected. She continued to work in the glove boxes and upon withdrawing her hands from one of the boxes about 6:30 p.m. she did find contamination. Further checks were made in the laboratory and other contaminations were found, particularly inside the gloves and the glove box in which she had been working, polishing and containing plutonium. The contamination was found on Silkwood's left hand, right wrist, upper arm, neck, face, hair and in her nostrils. She was immediately decontaminated and placed on a five day voiding collection program, and was furnished with urine and fecal kits to take home for the purpose of obtaining samples which were to be sent to the United States Testing Laboratory for analysis. She monitored herself at 1:10 a.m. and found no contamination. The glove box was later tested by AEC investigators and no leaks were found. The investigators found no significant airborne contamination in the laboratory.

The *second* of the three incidents occurred on November 6, 1974. Silkwood arrived at work that day at 7:50 a.m. and did some paperwork in the lab until 8:50 a.m. At that time, she left to attend a union meeting. Before leaving she tested herself and found contamination on her hands. Tests showed fixed contamination of her right forearm, face and neck. Her hands were then decontaminated. Since the other spots appeared to be fixed contamination, she was allowed to proceed to the union meeting. She returned to the health office at 4:30 p.m., where a slight contamination was found on her right forearm, neck and face and in her nostrils. Again she was decontaminated, and at her request her locker and auto were tested and found to be free of contamination. The described second

incident raises a question because she had not been working with plutonium on the 6th of November at all. She had been restricted to paperwork in the lab prior to going to the union meeting. When she was monitored, the tests showed that she was contaminated, but she apparently had no exposure within the plant which would have produced contamination. The logical inference is that this contamination occurred away from the plant.

The *third* incident of contamination occurred the next day, November 7th, 1974. This apparently occurred *away* from work, Silkwood went directly to the plant's health and physical office when she reported to work. There she was found to be contaminated in her nostrils and on her hands, her arms, chest, back, neck and right ear. Four urine samples and one fecal sample collected on or after November 4th were found to be contaminated, although the exterior of the kits showed no contamination. It was stipulated by the parties that urine samples brought to the plant had been spiked with plutonium, that is, they contained insoluble, non-naturally excreted plutonium. Here again the positive evidence was that the exposure occurred in her apartment.

It was after this that Silkwood's apartment was found to have been contaminated. The highest concentration of plutonium were found in the bathroom and on a package of bologna and cheese in the refrigerator. It could be inferred that the contamination from the first incident occurred within the plant. This was the day that she was working inside the glove boxes. On the second day, however, she had been performing paperwork in the lab until 8:50 a.m., at which time she left to attend a union meeting. Before leaving she tested herself and found contamination on her hands, etc. We noted above that she had had no exposure within the plant which would have produced contamination, with the possible exception of the papers that she was working with.

The third contamination incident obviously occurred away from the plant and presumably at her home because she went directly to the physical health office when she reported for work and was found to be contaminated in her nostrils, on her hands, arms, chest, back, neck and right ear. This was the day, too, that she presented urine samples spiked with plutonium.

The majority opinion concludes that the inference to be drawn is that all of the plutonium contamination occurred at the plant. This, however, ignores the fact that there is substantial evidence showing that contamination occurred off the premises, in her apartment, and indeed this evidence jibes with the evidence that the apartment itself was substantially contaminated.

A good deal of evidence was offered which was designed to show that Kerr-McGee had a motive for intentionally exposing her to contamination. She was not popular in the plant among the loyal employees. This was due to the work that she was shown to have been engaged in, her evidence gathering activities, and her efforts to show that plutonium was escaping from the plant.

Following Silkwood's death, the autopsy revealed that the amount of plutonium within her body at the time of her death was between 25% and 50% of the permissible lifetime body burden allowed by the AEC for plutonium workers. From her body condition and from the contamination that was found in her apartment, together with the evidence of her personal contamination, the logical inference is that the contamination took place outside the plant.

Defendants' theory of the case was, of course, that all of the contamination originated on the premises of the company. On the other hand, the plaintiff's theory of the case was that all exposure originated in Silkwood's apartment. The evidence is susceptible to either conclusion. In the face of such conflicting evidence, the question should go to the jury (as Kerr-McGee has requested alterna-

tively). It was error for the majority to ignore the disputed facts and to hold that all the inferences favored the conclusion that contamination had been suffered on the premises of Kerr-McGee. Submission to a jury of twelve would have been the fair and conclusive way to solve this conflict.

II

Allowance of Property Damages

In allowing the award of property damages to the plaintiffs, the majority distinguishes between *personal injury*, which it holds to be subject to workers' compensation, and property damage, which is not so recoverable. Kerr-McGee argues, however, that its substantial compliance with preemptive federal regulations is conclusive evidence of due care and precludes recovery under a strict liability standard applicable to a private civil action. The fact that the federal government did not find fault on Kerr-McGee's part does not provide full and pervasive immunity.

The $5,000 *property damage* award, is not regarded by the majority as a remedy which would significantly interfere with federal regulations of Kerr-McGee's plant. I agree.

Furthermore, the majority says that the AEC has not been authorized to provide compensatory award for property or other losses to a victim of a nuclear injury unless the injury falls within the Price-Anderson Act, which is intended to compensate victims of a widespread nuclear catastrophe. In further discussion, the majority notes that the Supreme Court, and Congress also, have recognized that state tort law principles continue to be applicable to some extent in off-site damage cases. In *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), the Supreme Court noted that the right to utilize common-law remedies *"at least with regard to nuclear accidents* was replaced by the com-

pensation mechanism of the statute." 438 U.S. at 88, n.33, 98 S.Ct. at 2638 n.33. This statement clearly implies that such remedies remain intact in cases which do not involve a nuclear accident.

In enacting the Price-Anderson Act, 71 Stat. 576 (1957), 42 U.S.C., Congress sought to address the problem likely to result from nuclear *disasters* which might deter the industrial development of nuclear energy. The Act requires nuclear energy companies to take out insurance in order to protect against these extraordinary nuclear occurrences. In respect to nuclear incidents below the level of the extraordinary cases, *i.e.*, cases like the present controversy which is conceded to be a lesser incident, private tort actions arising under state common law are to be used. Indeed, the congressional commentary expresses this interest.

The majority also concedes that strict liability is a theory which is to be pursued in this area, and that Oklahoma would apply strict liability to the escape of plutonium, a highly toxic and dangerous substance. *Young* v. *Darter*, 363 P.2d 829 (Okl. 1961) (herbicide spray); *Kirkland* v. *General Motors Corp.*, 521 P.2d 1353 (Okl. 1974). Thus, the majority recognizes that nuclear energy is an area in which no court is likely to refuse to recognize the applicability of strict liability. Restatement of Torts, Second, § 520, Comment g (1977). The very essence of liability without fault is, of course, the carrying on of ultrahazardous activity, that which exposes to an abnormal risk. In conducting this kind of activity, it is foreseeable that serious injury will occur irrespective of fault. The risk is of such great magnitude that the activity is ultrahazardous, such that the person carrying on the activity is liable regardless of fault.

This then was the rationale of the majority for affirming the award of $5,000 property damages. As noted at the outset, we do not dispute this conclusion.

The jury also found that Silkwood did not intentionally or wilfully remove plutonium from the plant. All of the plutonium was conceded to have originated on the Kerr-McGee premises.

III

Does the Atomic Energy Act of 1954 Impliedly Preempt That Part of the State Remedy Which Authorizes Punitive Damages?

It is recognized in the majority opinion that nowhere in the Price-Anderson Act is there any mention of punitive damages. It is admitted, however, that mention in the Price-Anderson Act that state law may determine tort liability is susceptible to being read to permit punitive as well as compensatory damages in states like Oklahoma which permit them. The opinion considers important the fact that with regard to extraordinary nuclear occurrences (governed by Price-Anderson), provision is made for compensatory damages only. But we are not here dealing with that kind of a catastrophe nor with the Price-Anderson Act. Hence, the silence of the Price-Anderson Act is not probative. The question here is whether the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*, as construed in *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd, Mem.*, 405 U.S. 1035, 92 S.Ct. 1307, 31 L.Ed.2d 576 (1972), impliedly preempts part of the Oklahoma common law remedy.

The state was precluded as a result of the decision in *Northern States Power Co.* from undertaking the scheme of regulation of atomic energy which was then being carried out by the N.R.C. pursuant to the Atomic Energy Act. It is one thing to preempt the area which the federal government has undertaken to license and regulate; it is another for a court to read into the Act an intent to preempt a form of damages which would otherwise be a part of an isolated private lawsuit. This conclusion is particu-

larly apt where no evidence exists either on the face of the Act or otherwise of an implied purpose to so preempt by the Congress.[1] Indeed, the fact that private lawsuits are tolerated without any limitations argues against the majority position.

The general approach to preemption of state authority is shown in Constitutional Law Cases and Materials by Professor Gerald Gunther, athed. (1975). Professor Gunther states:

> When Congress exercises a granted power the federal legislation may displace state law under the supremacy clause of Article VI. *But Congress does not typically act on a wholesale basis, and congressional entry into a field does not necessarily end all state authority.* (emphasis added). *Id.* at 357.

What the author is saying is that preemption is not readily implied. Hart and Wechsler, *The Federal Courts and the Federal System*, 2nd. ed. (1973) is cited as being in accord with this position. The authors state at pp. 470-471:

> Federal law is generally interstitial in nature. It rarely occupies a legal field completely * * *. Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.

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[1] The fact that Congress has expressly excepted the private tort action without restriction argues against any implied intent to preempt a part of such action.

Professor Gunther points out that the problem is one of statutory interpretation. He further states that:

> [S]tate regulation falls not because of the commerce clause but because, under the supremacy clause of Art. VI, the "supreme" congressional law supersedes state law. Constitutional Law at 357.

He goes on to say that:

> [P]reemption occurs not only when there is an outright conflict between the federal scheme and the state requirement. State authority is barred as well when congressional action is an *implicit* barrier: when state regulation would interfere unduly with the accomplishment of congressional objectives. Determination of congressional requirements and purposes must start of course with the congressional statute itself, and the cases accordingly require particularized examination of the specific regulatory scheme. *Id.*

In this case, unlike the other preemption cases, there are no competing regulatory schemes.

There is a shortage of case authority which even considers the issue as to whether a civil action or some phase of it (as in this case) is subject to preemption under Article VI of the Constitution. Our search has uncovered a few decisions which have involved state suits. None of these have accepted preemption as being the dispositive formula.[2]

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[2] *Bramer* v. *United States*, 595 F.2d 1141 (9th Cir. 1979), a tort claims action by a serviceman for a radiation related injury. The Ninth Circuit found that preemption was not an issue except where Congress had expressly or impliedly provided for the supremacy of federal law. *Id.* at 1144, n. 7.

Rogers v. *Ray Gardner Flying Service, Inc.*, 435 F.2d 1389 (5th Cir. 1970), *cert. denied*, 401 U.S. 1010, 91 S.Ct. 1255, 28 L.Ed.2d 546

The Eighth Circuit's opinion in *Northern States Power Co.* (affirmed by the Supreme Court) is a very sound opinion. By showing how the doctrine of preemption operates, it provides a contrast to this case and shows the inadequacy of the preemption showing here.

The Supreme Court's decision in *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) has some relevance in that it shows

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[2](Continued)

(1971), was a wrongful death action arising out of a private airplane crash in Oklahoma. The Fifth Circuit ruled that a Federal Aviation Act agency provision did not preempt an Oklahoma bailment law. Congress held not to have expressly preempted the field; tort law said to have been historically left to the states. *Id.* at 1393-94. Oklahoma law found to preclude liability (on other grounds).

In *Smith* v. *Cessna Aircraft Corp.*, 428 F.Supp. 1285 (N.D.Ill.1977) no preemption by federal law of state law in a plane crash case. Illinois had held that federal contribution laws preempted state law in a major aircrash case because of "the predominant, indeed almost exclusive, interest of the federal government in regulating affairs of the nation's airways." The court recognized that there was considerable congressional "opposition to interference with traditional state tort law." 428 F.Supp. at 1287. It was concluded that the case presented no necessity for preemption by federal law.

Southern Pacific Transportation Co. v. *United States*, 462 F.Supp. 1193 (E.D.Cal.1978), a railroad suit against the United States for damages caused by a shipment of bombs. The railroad urged that state law was preempted because of federal regulations pertaining to the shipment of bulked goods on railroads. Held: no preemption, since many ICC regulations cited by the railroad had little or nothing to do with the accident. 462 F.Supp. 1223-27.

Harper and Row Publishers, Inc. v. *Nation Enterprises*, 501 F.Supp. 848 (S.D.N.Y.1980) was a copyright action. The court found there that the plaintiff's state law claims were preempted by the federal Copyright Act. The case is noteworthy because it emphasized the importance of a specific express declaration of preemption by Congress.

reluctance to exercise preemption. There a California statute

> barred avocados which did not meet the state's minimum oil content standard of maturity. Federal marketing orders issued pursuant to the Agricultural Adjustment Act gauged the maturity of Florida avocados by standards other than oil content.

Thus, the state was seeking to regulate the same subject matter which federal regulations addressed in seeking to solve the same problem. Notwithstanding the conflict the Supreme Court held:

> that the supremacy clause did not prohibit California from excluding Florida avocados certified as mature under the federal regulations but which contained less than the minimum California oil content.

The majority opinion concluded that there was not an actual conflict between the two schemes of regulation and that both could live, one with the other. It was said in that case that there was no evidence of a congressional design to preempt the field; that there was no physical impossibility in complying with both standards. The maturity of avocados seemed to be an inherently unlikely candidate for exclusive federal regulation; the federal regulation there in issue which set minimum standards for agricultural commodities, even though comprehensive, did not in and of itself show implied displacement of state control over distribution and sale of those commodities in the interest of the consumers of the commodities within the state. The opinion finally said that the Court was unable to find an unambiguous congressional mandate to exclude state regulation. The federal law involved concerned minimum rather than uniform standards. The statutory scheme was one of regulating maturity, and was drafted and administered locally by the growers' own representatives and was designed to do more than promote orderly competition among the South Florida growers. The dissenting opinion saw the federal scheme as a comprehensive

regulatory program and the California scheme as identical in structure to the federal one. They said that the question was purely an economic one.

Why is the *Florida Lime and Avocado Growers* case helpful here? It shows the Supreme Court's tendency to refrain from declaring implied preemption whereby a state law is displaced by a federal one.

All of the decided cases tend to reveal the inherent weakness on the preemption question of the majority position. A holding that preemption is present here is a gross infringement of state prerogatives as well as the rights of individual citizens.

* * * *

In the case before us, neither express preemption nor implied preemption is appropriate. Nor does the fact situation as a whole suggest applicability of the preemption doctrine. The simple reason is that it is not needed and would be superfluous.

IV

The Lack of Authoritative Cases in Support of Preemption as Here Presented

The majority seeks to support its preemption of punitive damages position with the decision in *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143 (8th Cir.), *aff'd mem.* 405 U.S. 1035, 92 S.Ct. 1307, 31 L.Ed.2d 576 (1972). It also cites *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976), but does not emphasize that case. The majority opinion states that: "Imposing a state tort law rule of strict liability for nuclear-related property damage * * * might in some instances encroach upon federal regulations setting effluent or other standards." Thus, it "might" encroach in some instances.

The above does not say that it does encroach. It merely speaks of possible encroachment; the majority does not say

that encroachment is present. The majority concludes that imposition of tort liability in this case will significantly interfere with federal regulation. This latter conclusion suggests that preemption is to be decided on a case to case basis. Clearly it is not. The federal government has either preempted or it has not.

So far the majority is speaking of tort liability. It now turns to exemplary damages.

From the *Northern States* holding that the field of licensing and regulation has been preempted, it is contended that exemplary damages, due to their punishment aspect, cannot be awarded. But a tort action is a far cry from a regulatory system. The fact that Minnesota is precluded from this governmental activity falls short of dictating that exemplary damages have to be barred.

If a tort action does not interfere, the award of exemplary damages cannot impede federal government regulation. After all, the award of a large amount of actual damages can be equally punishing. It is the money which causes the suffering, not the designation.

The Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2284, preempts the field of nuclear licensing and regulation. But until now, no effort has been made to abolish damages in a private civil action. No collision exists nor is one possible between the simple state law inspired tort action and the federal government. To say that preemption prevents the imposition of exemplary damages in connection with a civil judgment carries the preemption concept far beyond anything that could have been intended or could ever be implied. The decision in the *Northern States* case was, as conceded by the majority, that Minnesota could not impose state licensing and regulation on Minnesota power plants in the face of a similar federal regulation scheme. This is unquestioned preemption.

Also in *Northern States*, it was made clear from a study of the congressional history that the intent of the

Act was to preempt regulatory licensing authority. It was the licensing and regulation of more dangerous activities which was preempted by the federal government. The Joint Report of the Congress declared that it was intended to leave no room for the exercise of dual or current jurisdiction by states to control radiation hazards by regulating by-product source or special nuclear materials. 447 F.2d at 1151.

> The intent is to have the material regulated and licensed either by the Commission, or by the state and local governments, but not by both. The bill is intended to encourage states to increase their knowledge and capacities and to enter into agreements to assume regulatory responsibilities over such materials.

Thus, it was special hazards which the federal government retained for its responsibility. These included the construction and operation of production utilization facilities, including reactors. It was pointed out that:

> Subsection k provides that nothing in the new section 274 shall be construed to affect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards. This subsection is intended to make it clear that the bill does not impair the state authority to regulate activities of AEC licensees for the manifold health, safety and economic purposes other than radiation protection. As indicated elsewhere, the Commission has exclusive authority to regulate for protection against radiation hazards until such time as the state enters into an agreement with the Commission to assume such responsibility.

The analysis by the *Northern* court brings out the concern of the Congress as to possible dual federal-state control, a concern which could not exist here.

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In closing, I have some views regarding the large amount of the exemplary damages awarded by the jury.

However, there is no need to consider this problem here at this time since the amount of reduction is not an issue. At the present writing, at least, the cause appears to be a lost one.

Finally, it is helpful to review some of the governing criteria. These are summarized by the Supreme Court in *Hines* v. *Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). The state law there at issue required that certain aliens register as such and carry a card. The Supreme Court held that the subject of registration of aliens, because of its national and international nature, was preempted by the national government and that the power of the state was not concurrent.

The Court said in speaking of a formula:

> There is not — and from the very nature of the problem there cannot be — any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This court * * * has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. * * * * In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances * * * * Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.* at 67, 61 S.Ct. 404.

Applying the Supreme Court's test in *Hines*, the conclusion would certainly be the preemption does not apply in this case, nor do any of the other suggested expressions of Justice Black apply to our problem.

We conclude that there is no justification whatsoever based on precedent, history, policy or reason which justifies a holding that preemption applies to the present problem.

NOVEMBER TERM — February 19, 1982

Before Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, deceased, Plaintiff-Appellee,	)	
v.	)	No. 79-1894
THE KERR-McGEE CORPORATION, a Delaware corporation, and KERR-McGEE NUCLEAR CORPORATION, a Delaware corporation, Defendants-Appellants.	)	

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted. Judge Doyle voted to grant rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and the Court having been polled on the suggestion for rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, rehearing en banc is denied. Circuit Judges Barrett and Doyle voted to grant rehearing en banc. Circuit Judge Holloway is recused, and took no part in this matter.

(s) *Howard K. Phillips*
HOWARD K. PHILLIPS, Clerk